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Dispute Settlement and the Establishment of the Continental Shelf Beyond 200 Nautical Miles

Bjarni Már Magnússon

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Contents

Abstract

One of the central purposes of the international law of the sea is to define various maritime zones, their extent and limits. One of these zones is the continental shelf. The continental shelf in modern international law has two aspects: The continental shelf within 200 nautical miles from the shore of coastal States and the continental shelf beyond that limit.

The United Nations Convention on the Law of the Sea provides that information on the limits of the continental shelf beyond 200 nautical miles shall be submitted by the coastal State to a scientific and technical commission, namely the Commission on the Limits of the Continental Shelf. The Commission is responsible for making recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelves beyond 200 nautical miles. If the limits of the shelf established by a coastal State are on the basis of the recommendations, they are final and binding.

The establishment of the continental shelf beyond 200 nautical miles has two main features: The establishment of the boundary line between the continental shelf and the international seabed area and the establishment of the boundary between the continental shelf of adjacent or opposite coastal States. Many questions concerning the relationship between these procedures have been left unanswered as well as the relationship between the Commission and international courts and tribunals.

This thesis analyses the role of coastal States, the Commission and international courts and tribunals in the establishment of the continental shelf beyond 200 nautical miles and the interplay between them. It explores how the various sources of international law have contributed to the establishment of the current legal framework.

The thesis explores the differences between the delineation and delimitation of the continental shelf beyond 200 nautical miles. It demonstrates that the role of the Commission is to curtail extravagant claims to the continental shelf beyond 200 nautical miles and protect the territorial scope of the international seabed area. It also shows that the role of international courts and tribunals in this field is essentially the same as their role in other types of disputes. It explains that the establishment of the boundary line between the continental shelf and the international seabed area and the establishment of the boundary between the continental shelf of adjacent or opposite coastal States is a separate process. Furthermore, it clarifies that the three-stage boundary delimitation method is applicable beyond 200 nautical miles. It also displays that no special rule of customary international law has evolved that is solely applicable to delimitations regarding the continental shelf beyond 200 nautical miles.

The thesis addresses the interaction of the various mechanisms within the United Nations Convention on the Law of the Sea concerning the continental shelf beyond 200 nautical miles. Its main conclusion is that despite the possibility for tension to arise the relationship between the institutions is clear and precise and they together form a coherent system where each separate institution plays its own part in a larger process.

Abbreviations

ABLOS	Advisory Board on the Law of the Sea
AJIL	American Journal of International Law
ARIEL	Austrian Review of International and European Law
BYBIL	British Yearbook of International Law
Chinese JIL	Chinese Journal of International Law
CLCS	Commission on the Limits of the Continental Shelf
Denv. J. Int'l & Pol'y	Denver Journal of International Law and Policy
EC	European Communities
ECOWAS	Economic Community of West African States
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
FAO	Food and Agricultural Organization
GYBIL	German Yearbook of International Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJMCL	International Journal of Marine and Coastal Law
IHO	International Hydrographic Organization
IMO	International Maritime Organization
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IOC	Intergovernmental Oceanographic Commission
ITLOS	International Tribunal for the Law of the Sea
Law & Contemp. Probs.	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
LLGDS	Land-locked and geographically disadvantaged States
LOSB	Law of the Sea Bulletin
LOSC	United Nations Convention on the Law of the Sea
LOS Convention	United Nations Convention on the Law of the Sea
LNTS	League of Nations Treaty Series
MLR	Modern Law Review

NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NM	Nautical Mile(s)
ODIL	Ocean Development and International Law
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
SPLOS	State Parties to the United Nations Convention on the Law of the Sea
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
Vand. J. Transnat'l Law	Vanderbildt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

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Declaration

I declare that this thesis has been composed by myself. It is my own work and it has not been submitted for any other degree or professional qualification.

Bjarni Már Magnússon

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1. Introduction

1.1. The Topic

This thesis addresses disputes concerning the establishment of the continental shelf beyond 200 nautical miles.[1] The reason why there is global interest in this issue lies in the fact that it is often necessary for coastal States to settle these disputes before deciding the outer limit of the shelf and before exploring and exploiting important natural resources from the seabed beyond 200 nm. It is, for instance, very unlikely that oil and gas companies are willing to make an investment in disputed areas. The economic, financial and political incentives to solve such disputes are consequently often high. Another factor is that territorial rights and natural resources have throughout history been a flammable combination which has negatively impacted peace and stability in the international society.

One of the central purposes of the international law of the sea is to define various maritime zones, their extent and limits. According to the United Nations Convention on the Law of the Sea[2] the continental shelf extends at least to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured.[3] If a coastal State fulfils complex geoscientific criteria laid out in the Convention it can make a claim to the continental shelf beyond the 200 nm limit.[4]

UNCLOS provides that information on the limits of the continental shelf beyond 200 nm from the baselines shall be submitted by the coastal State to a scientific and technical commission, named the Commission on the Limits of the Continental Shelf.[5] The Commission is responsible for making recommendations to coastal States on matters related to the establishment of the outer limits of their

[1] 1 nautical mile (nm) equals 1,852 metres.

[2] Adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 396 (UNCLOS or the Convention). Some authors use the abbreviation LOSC or LOS Convention.

[3] Article 76(1) of UNCLOS. The provisions on baselines are found in articles 5-14 of UNCLOS

[4] For the reason of simplification, the continental shelf beyond 200 nm is often referred to as the outer continental shelf in this thesis while the continental shelf within 200 nm is sometimes referred to as the inner continental shelf. These terms are nowhere to be found in UNCLOS and are not theoretically correct since 'there is in law only a single "continental shelf" rather than an inner continental shelf and a separate extended or outer continental shelf'. *In the Matter of an Arbitration between Barbados and the Republic of Trinidad and Tobago (Barbados v. Republic of Trinidad & Tobago)* (Arbitration Tribunal) (2006) 45 ILM 800, 835, para. 213 (*Barbados/Trinidad & Tobago Case*); See also *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)* (Judgement) 2012 <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf> accessed 16 July 2012 [108, para. 362] (*Bay of Bengal Case*).

[5] Hereinafter the Commission or CLCS.

continental shelves beyond 200 nm. If the limits of the shelf established by a coastal State are on the basis of the recommendations, they are final and binding.[6] This process is quite different from the one provided for in the 1958 Geneva Convention on the Continental Shelf[7] and from the establishment of other maritime zones under international law which can be established without the involvement of an international entity.

The establishment of the continental shelf beyond 200 nm has two main features: The establishment of the boundary line between the continental shelf and the international sea bed area[8] (the delineation of the continental shelf) and the establishment of the boundary between the continental shelf of adjacent or opposite coastal States (the delimitation of the continental shelf).[9] These two features are procedural in nature. The delineation process is a complex legal-scientific/technical procedure where the CLCS plays a pivotal role in curtailing the territorial temptations of broad margin States. Its task is to protect the Area beyond the limits of national jurisdiction that has been designated as the common heritage of mankind.

The delimitation process is different from the CLCS procedure. The actions of the CLCS are without prejudice to matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.[10] According to UNCLOS it is for neighbouring States to delimit the maritime boundaries of their continental shelves.[11] The delimitation is supposed to be effected by agreement and,

[6] Article 76(8) of UNCLOS.
[7] Adopted on 29 April 1958; entered into force 10 June 1964; 499 UNTS 311 (1958 Continental Shelf Convention). The 1958 Continental Shelf Convention is one of four conventions adopted in Geneva in 1958 which are the predecessors to UNCLOS.
[8] The international seabed area is usually referred to as the Area. Article 1(1) of UNCLOS defines the Area as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'. The definition is a negative one 'for in order to know the exact extent of the Area, one needs to know up to where exactly coastal states have extended their national jurisdiction at sea'. Erik Franckx, 'The International Seabed Authority and the Common Heritage of Mankind: The need for States to Establish the Outer Limits of their Continental Shelf' (2010) 25 IJMCL 543, 552. Article 140 of UNCLOS provides that '[a]ctivities in the Area shall ... be carried out for the benefit of mankind as a whole'.
[9] These two terms should not be confused with the term demarcation which is important in land boundary delimitations. The demarcation of a land boundary 'amounts to laying it down, as mutually defined, by means of boundary pillars, monuments and buoys, and permanent erections of other kinds, along the topographical conformations of the territories to be separated by it'. A. Cukwurah, *The Settlement of Boundary Disputes in International Law* (Manchester University Press 1967) 28. Demarcation is of limited practical value in outer continental shelf delimitations since the importance of visually showing the boundary line on the seabed itself is very limited.
[10] Article 9 of Annex II to UNCLOS.
[11] Article 83 of UNCLOS.

if not possible, within a reasonable time resort shall be made to procedures provided for in the dispute settlement part of UNCLOS.[12] The Convention provides that this process shall be guided by international law as defined in article 38 of the Statute of the International Court of Justice (ICJ Statute). The most important outcome of this guidance is that it designates a law-making role for international courts and tribunals. The purpose of the delimitation is to achieve an equitable solution,[13] not to fulfil specific scientific and technical criteria as in the CLCS procedure. From the work of Aristotle to modern times equity has been associated with procedure. Equity viewed in these terms aims 'to devise remedies giving fuller effect to the norms of positive law'.[14]

The relationship between the delineation process of the outer continental shelf and the dispute settlement procedures under UNCLOS has been controversial because States failed to address the issue when negotiating the Convention. The outcome of the same negotiations was that international courts and tribunals were mandated to decide what is the law in maritime boundary delimitations. Consequently, international courts and tribunals have been given a central role in deciding what is the procedural and substantive law in this field. So far only one delimitation case regarding the outer continental shelf has been decided by an international tribunal, namely the *Bay of Bengal Case* which was decided by the International Tribunal for the Law of the Sea.[15] More such cases are, however, to come.[16] It is hoped that this thesis will be of some help to future litigation, negotiations and academic discussions.

1.2. The Approach

This thesis is about the relationship between the delineation and delimitation of the outer continental shelf, the relationship between the inner and outer continental shelf

[12] Part XV of the Convention contains the provisions on dispute settlement.
[13] Ibid. This is also the purpose of delimitations involving the Exclusive Economic Zone (EEZ). See article 74(1) of UNCLOS.
[14] Phaedon Kozyris, 'Lifting the Veils of Equity in Maritime Entitlements: Equidistance with proportionality around the islands' (1997-8) 26 Denv. J. Int'l & Pol'y 319, 326.
[15] Hereinafter ITLOS or the Tribunal.
[16] In April-May this year a dispute that involves considerations regarding the delimitation of the outer continental shelf was heard before the International Court of Justice (ICJ or the Court). See *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Pending) <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=nicol&case=124&k=e2> accessed 16 July 2012.

and the relationship between the CLCS and international courts and tribunals. The thesis is also about the role of science and scientific experts in international law and who is responsible for applying and interpreting the law in an area which involves complicated scientific and technical considerations. An attempt is made to answer the six following questions:

- What are the similarities and differences between delineation and delimitation of the outer continental shelf?

- What is the role of the Commission on the Limits of the Continental Shelf in delineation and delimitation disputes?

- What is the role of international courts and tribunals in disputes regarding the establishment of the outer continental shelf?

- Are there any special factors concerning the outer continental shelf that limit the jurisdiction of international courts and tribunals?

- Are the principles of the delimitation of the continental shelf beyond 200 nm the same as those for within 200 nm?

- Has a rule of customary international law emerged that is especially applicable in outer continental shelf delimitations?

1.3. Outline of the Study

This thesis will address some of the larger questions concerning the establishment of the outer continental shelf. Chapter two explains various important concepts for the subject of the thesis and discusses the main aspects of delineation and delimitation of the outer continental shelf. It focuses to a large extent on the historical development that led to the current legal framework concerning the continental shelf, who are entitled to it, how it is established and how it is delimited between adjacent or opposite States.

Chapter three focuses on the legal nature of the CLCS, its recommendations and how the Commission differs from international dispute settlement bodies. It asks the question of what the CLCS really is. It deals also with questions regarding the interpretation of article 76(8) of UNCLOS. In addition, an attempt is made to explain how the Commission deals with submissions in the event of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes.

Chapter four focuses on the settlement of disputes by international courts and tribunals in the context of the outer continental shelf. Jurisdictional and procedural matters are the focal point. It examines the dispute settlement mechanism of UNCLOS, the law-making role of international courts and tribunals and questions concerning the optional exception clause, standing and whether States are obliged to await recommendations from the CLCS before they seek to delimit their outer continental shelf. The chapter also addresses the evaluation of scientific and technical evidence in cases concerning the outer continental shelf and the consequences of a judgement for the CLCS.

Chapter five aims to shed light on the methods that have been used and could be used in boundary delimitations involving the outer continental shelf. An attempt is made to answer the question of whether the principles of maritime delimitation of the outer continental shelf are the same as those for the delimitation of the inner continental shelf. It asks whether the equidistance/relevant circumstances method is applicable in delimitation cases before international courts and tribunals concerning the outer continental shelf and analyses boundary agreements involving the outer continental shelf with the aim of identifying trends and differences in the State practice. Finally, the conclusions of the thesis are found in chapter six.

Overall, this thesis analyses the role of coastal States, the CLCS and international courts and tribunals in the establishment of the outer continental shelf and how the legal framework can be further coherently developed in accordance with international law.

2. The Establishment of the Continental Shelf Beyond 200 Nautical Miles

2.1. Introduction

This chapter addresses the establishment of the outer continental shelf. The purpose of it is twofold: To define important concepts for the purposes of the thesis and to explain the main aspects of the delineation and delimitation of the outer continental shelf. Consequently, this chapter is divided into two main parts. The former part discusses the establishment of the outer limits of the continental shelf. It gives a brief historical overview of the concept and introduces the natural prolongation concept. For the sake of convenience the natural prolongation discussion will not separate delineation and delimitation considerations. Finally, the main provisions of UNCLOS regarding the establishment of the continental shelf are explained and a short overview is given about coastal States rights and duties in the continental shelf.

The later part of this chapter is dedicated to the delimitation of the continental shelf between neighbouring States. The main purpose of this part is to introduce the main underlying ideas and principles of maritime boundary delimitation. Moreover, the part explains the views of the two main schools of maritime boundary delimitation. Finally, it gives a brief historical overview of continental shelf delimitation. Although this chapter is divided into two main parts, for structural reasons, it must be borne in mind that the issues relating to delineation and delimitation overlap profoundly and cannot be viewed in complete isolation from each other.[17]

2.2. What is the Continental Shelf?

The term continental shelf does not have the same meaning in international law as in science. The scientific meaning of the continental shelf refers to the platform on which the land lies. In a more detailed way it can generally be described as following:

> Physically, the sea bed adjacent to a typical coast is usually considered to consist of three separate sections ... First, the section that slopes down gradually from the low-water mark to the depth, averaging about 130 metres, at which the angle of declination increases markedly: this is the

[17] See Coalter Lathrop, 'Continental Shelf Delimitation Beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf' in David Colson & Robert Smith (eds.) *International Maritime Boundaries* vol. VI (Martinus Nijhoff 2011) 4139, 4140 (hereinafter IMB 6).

> continental shelf proper. Second, the section bordering the shelf and having the steeper slope, going down to around 1,200 to 3,500 metres: this is known as the continental slope. Third, there is in many locations an area beyond the slope where the sea bed falls away more gradually and is composed mainly of sediments washed down from the continents. This is called the continental rise, and typically descends to a depth of around 3,500 to 5,500 metres. Together these three sections form the continental margin, which constitutes about one-fifth of the sea floor.[18]

Beyond the outer edge of the continental margin is the deep ocean floor which includes the oceanic features of the seafloor, such as ocean basins, abyssal plains, abyssal hills, mid-ocean ridges, fracture zones and seamounts. The main reason why there is a large interest in the establishment of the continental shelf is that in many places the continental margin is rich of natural resources suitable for exploitation, the most important being oil and gas. Other possible future energy sources, are also found there, 'such as gas hydrate, a methane/water mixture frozen into the sediments'.[19] It also 'includes many types of sea-floor formations with metal and mineral resource potential, such as polymetallic nodules' and biological resources used for medical and pharmaceutical purposes.[20]

The continental shelf as it is described in UNCLOS is partially a legal fiction. The continental shelf in the meaning of UNCLOS extends throughout the natural prolongation of the land territory to the outer edge of the continental margin or to a distance of 200 nm from the baselines where the outer edge does not extend up to that distance.[21] The seabed itself has no role in the latter method, only distance. It must also be noted that the seabed within the territorial sea, which is of course part of the physical continental shelf, is not part of the legal continental shelf.

2.3. The Establishment of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles

2.3.1. The History of the Legal Continental Shelf 1945-82

It is customary to view the statement made by United States President Harry Truman (the Truman Proclamation) on 28 September 1945[22] as the beginning of the modern

[18] Robin Churchill & Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999) 141.
[19] Huw Llewellyn, 'The Commission on the Limits of the Continental Shelf: Joint Submission by France, Ireland, Spain and the United Kingdom' (2007) 56 ICLQ 677, 680.
[20] Ibid.
[21] Article 76(1) of UNCLOS.
[22] U.S. Presidential Proclamation No. 2667, 'Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf' (28 September 1945) 10 Fed. Reg. 12303 (Truman Proclamation). The seeds of the Proclamation 'can be found as early as the late 1930's. It was during this period that pressure from distant water Japanese fishermen motivated

continental shelf regime. It must though be noted that a small number of States had already regulated the exploitation of resources of the seabed and subsoil beyond the territorial sea, as well as the physical seabed, long before the Truman Proclamation. For instance, pearl fisheries of Ceylon were regulated from 1811.[23] Moreover, in 1936 the United Kingdom proposed to Venezuela new legal criterion for the exploitation of what were initially called submarine areas.[24] The proposal was at the time however, rejected by Venezuela; the latter believing that it contradicted the principle of the freedom of the high seas.[25] Although, the idea of extended seabed jurisdiction had already been introduced before the Truman Proclamation it was the Proclamation itself that 'came to be regarded as the starting point of the positive law on the subject'[26] and began the development of the modern continental shelf concept. The Proclamation was mainly influenced by three factors. First, 'the need to find new deposits of petroleum and natural gas and minerals, lying in the seabed and the ocean floor and its subsoil'.[27] Second, 'to guard against a threatened shortage resulting from the depletion of world stocks during the Second World War'.[28] Third, 'to avoid dependence on imported supplies of these strategic raw materials'.[29]

The Proclamation stated that 'the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to its jurisdiction and control'.[30] The preamble of the Proclamation justifies its context mainly with

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President Roosevelt … to consider actions'. Jonathan Charney, 'Introduction' in Jonathan Charney & Lewis Alexander (eds.) *International Maritime Boundaries* vol. I (Martinus Nijhoff 1993) xxii, xxvi fn. 9 (hereinafter IMB 1). Another factor was that '[o]ffshore hydrocarbon development began at that time and states started in earnest to seek expanded offshore jurisdiction and to fix maritime boundaries with neighboring states'. Ibid.

[23] See Suzette Suarez, *The Outer Limits of the Continental Shelf* (Springer 2008) 21.

[24] Kaldone Nweihed, 'Trinidad and Tobago-Venezuela (Gulf of Paria)' Report Number 2-13(1) in IMB 1 (n 22) 639, 641.

[25] Ibid.

[26] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands & Denmark)* (Judgement) [1969] ICJ Rep 3, 32-3, para. 47 (*North Sea Case*).

[27] Shirley Amerasinghe, 'The United Nations Conference on the Law of the Sea' (Statement) in Myron Nordquist (ed.) *United Nations Convention on the Law of the Sea; A Commentary* vol. I (Martinus Nijhoff 1985) 1, 1. The Commentary is often called the 'Virginia Commentary' because of the role the Center for Oceans Law and Policy at the University of Virginia played in its creation.

[28] Ibid.

[29] Ibid.

[30] The Truman Proclamation (n 22).

reference to contiguity and reasonableness. The Proclamation was followed by similar claims from other States.[31]

The speed of the development of the continental shelf as a legal regime was unusually fast. Five years after the Truman Proclamation, Lauterpacht stated that '[s]eldom has an apparent major change in international law been accomplished by peaceful means more rapidly and amidst more general acquiescence and approval than in the case of the claims to submarine areas – the sea-bed and its subsoil – adjacent to the coast of littoral states'.[32] Moreover, Lauterpacht provided:

> [A]ssuming that we are confronted here with the creation of new international law by custom, what matters is not so much the number of states participating in its creation and the length of the period within which that change takes place, as the relative importance, in any particular sphere, of states inaugurating the change. In a matter closely related to the principle of the freedom of the seas the conduct of the two principal maritime Powers – such as Great Britain and the United States – is of special importance. With regard to the continental shelf and submarine areas generally these two states inaugurated the development and their initiative was treated as authoritative almost as a matter of course from the outset.[33]

Not everyone shared the same view. Amerasinghe, the first president of the Third United Nations Conference on the Law of the Sea,[34] pointed out that '[i]n 1945 the nations of the world were too enfeebled by six years of war or too pre-occupied with the pressing problem of repairing the havoc of war or too dependent on the United States to challenge the doctrine or reveal its flaws'.[35] Oda argued that the fact that many unilateral declarations provoked no protest from other States perhaps only meant nothing more than that these 'claims did not directly infringe upon the interests of other states at the time'.[36] Although some scepticism arose about the continental shelf as an instant custom, it was soon transported into treaty law within one of the Geneva Conventions, prepared by the International Law Commission,[37] thirteen years after the Proclamation. The 1958 Geneva Convention on the Continental Shelf defined the continental shelf as follows:

> For the purpose of these articles, the term 'continental shelf' is used as referring (*a*) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a *depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of*

[31] See e.g. Suarez (n 23) 25-9.
[32] Hersch Lauterpacht, 'Sovereignty over Submarine Areas' (1950) 27 BYBIL 376, 376.
[33] Ibid 394.
[34] Hereinafter the Third Conference.
[35] Amerasinghe (n 27) 1.
[36] Shigeru Oda, *International Control of Sea Resources* (Martinus Nijhoff 1989) 153.
[37] Hereinafter ILC.

> *the exploitation of the natural resources* of the said areas; (*b*) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[38]

The ICJ stated in the 1969 *North Sea Case* – the first continental shelf delimitation case that went before an international court – that the provision was one of the 'Articles being the ones which, it is clear, were ... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law' at the time they were negotiated.[39] It also laid much emphasis on the continental shelf being the natural prolongation of the coastal State's land mass although no mention is made of this concept in the 1958 Continental Shelf Convention. Even if the Geneva Conventions definition was accepted and adopted into domestic legislation by various States it was not free from difficulty. The former method, that is the 200-metre limit, which 'was chosen partly as corresponding approximately to the normal outer limit of the shelf in the physical sense,'[40] was not controversial. The alternative to the 200 metre depth criterion 'which has come to be known as the exploitability criterion ... constitutes the indeterminate nature and the unsatisfactory feature of the definition'.[41] There was an understanding that '[i]t was clear that new technology would push the limit farther and farther from the shore, and that "exploitability" – which could mean anything from the ability to drag up a basket of sedentary fish to the ability to establish a full–scale profit-making offshore oil complex – was itself an elusive criterion'.[42] In the years after the 1958 Continental Shelf Convention was concluded '[i]t was feared that the consequence of continued adherence to the exploitability test in the face of rapidly developing technology, rendering ever deeper areas "exploitable", would be the eventual extension of coastal State "continental shelf" claims so as to cover the entire ocean floor'.[43] Another related factor was that developing countries were concerned that the resources of the oceans would only be 'exploited by a few powerful States that would in this way be able to control the

[38] Article 1 of the 1958 Continental Shelf Convention (emphasis added).
[39] *North Sea Case* (n 26) 39, para. 63.
[40] *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)* (Judgement) [1982] ICJ Rep. 18, 45, para. 42 (*Tunisia/Libya Case*).
[41] Amerasinghe (n 27) 3.
[42] Churchill & Lowe (n 18) 147.
[43] Ibid.

world's economy'[44] whilst at the same time hoping 'that a share of the resources would help them eliminate their poverty problems'.[45]

A speech delivered by the Maltese Ambassador Arvid Pardo in 1967 before the United Nations General Assembly[46] is viewed as the beginning of a remarkable evolution in international law. His speech introduced an idea about the common heritage of mankind in the seabed and ocean floor beyond national jurisdiction. He proposed that the international community should establish an area of the seabed and ocean floor from which to exploit resources from the ocean depths.[47] Pardo's ideas instantly became popular, especially among developing and recently independent States. Two years after his speech, UNGA declared:

> [T]he definition of the continental shelf contained in the Convention on the Continental Shelf of 29 April 1958, does not define with sufficient precision the limits of the area over which a coastal state exercises sovereign rights for the purpose of exploration and exploitation of natural resources, and that customary international law on the subject is inconclusive.[48]

The next year UNGA declared that '[t]he sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction ... as well as the resources of the area, are the common heritage of mankind'.[49]

At the beginning of the 1970s there was a strong call for change in the law of the sea. This call was answered with the Third Conference that took place between 1973 and 1982. The main dispute at the Third Conference, regarding the continental shelf, concerned its outer limits.[50] Many States favoured the connection of the 200 nm limits of the EEZ and the continental shelf whereas the majority of States do not have a physical continental shelf beyond that distance. However, a number of coastal

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[44] Andree Kircher, 'The Outer Continental Shelf: Background and Current Development: Liber Amicorum Judge Thomas A. Mensah' in Tafsir Ndiaye & Rüdiger Wolfrum (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff 2007) 593, 595.
[45] Ibid.
[46] Hereinafter UNGA.
[47] 22 GAOR, Annexes, Vol. III, agenda item 92, paras. 3-4, UN Doc. A/6695 (18 August 1967).
[48] Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind. UNGA Res 2574 A (XXIV) (15 December 1969).
[49] Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, UNGA Res 2749 (XXV) (17 December 1970).
[50] The inner limit of the continental shelf has always been considered the outer limit of the territorial sea. Churchill & Lowe (n 18) 145. As is well known, the outer limit of the territorial sea was for a long time controversial. Consequently, this affected the location where the continental shelf was deemed to begin. This controversy was, however, never focused on the inner limits of the continental shelf.

States with prospects for extended continental shelves, usually called the broad margin States (including maritime powers such as USA, USSR, Argentina and Australia), 'were not happy with a plan that deprived them of large shallow-water shelf areas which they had always considered as their own'.[51] Instead, the broad margin States preferred a definition which would extend the continental shelf beyond 200 nm.[52] By the tenth session of the Third Conference in 1980, the UNCLOS provisions on the continental shelf were in their final form. The final outcome was one of compromise, it being recognised that coastal States could extend their continental shelf jurisdiction beyond 200 nm subject to detailed conditions.

The history of the continental shelf did not end in 1982 with the conclusion of UNCLOS. International courts and tribunals and the CLCS have developed the concept further, as will be explained below and in the following chapters.

2.3.2. Natural Prolongation

Coastal State's entitlement to any maritime zone is based on its title over the land. In the 1951 *Anglo-Norwegian Fisheries Case*, the ICJ observed in respect of the territorial sea that '[i]t is the land which confers upon the coastal State a right to the waters off its coasts'.[53] In the case of the continental shelf the fundamental concept has been 'the natural prolongation of the land domain'.[54] The continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea'.[55] It does so 'through the projection of the coasts or the coastal fronts'.[56] Phrased differently, 'continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State'.[57]

It must be emphasised that it is not the landmass itself which is the basis of entitlement to the continental shelf, it is the sovereignty over the landmass 'and it is by means of the maritime front of this landmass, in other words by its coastal

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[51] Hollis Hedberg, 'Ocean Floor Boundaries' (1979) 204 Science 135, 135.
[52] See e.g. Tomas Heidar, 'Legal Aspects of Continental Shelf Limits' in Myron Nordquist, John Moore & Tomas Heidar (eds.) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 19, 22-3.
[53] *Fisheries Case (United Kingdom v. Norway)* (Judgement) [1951] ICJ Rep. 116, 133.
[54] *North Sea Case* (n 26), 30 para. 40.
[55] Ibid 51, para. 96.
[56] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgement) [2009] ICJ Rep. 61, 89, para. 77 (*Black Sea Case*).
[57] *Aegean Sea Continental Shelf Case (Greece v. Turkey)* (Judgement) [1978] ICJ Rep. 3, 36, para. 86 (*Aegean Sea Case*).

opening, that this territorial sovereignty brings its continental shelf rights into effect'.[58] It is 'the coast of the territory of the State [which] is the decisive factor for title to submarine areas adjacent to it'.[59] This means that States with larger landmasses are not more entitled to the continental shelf than States with less landmass since the key issue is the coastal opening and not what lies behind it.

It was the ICJ in the *North Sea Case* 'which gave currency to the expression "natural prolongation" as part of the vocabulary of the international law of the sea'.[60] When rejecting the primacy of proximity in continental shelf delimitations the Court provided:

> What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion, − in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural −or the most natural− extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; − or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.[61]

Furthermore, the Court stated that the natural prolongation concept was to be applied in maritime boundary delimitations since it was one of the underlying ideas for the development of the legal regime for the continental shelf.[62] The concept of natural prolongation was explored in detail and elaborated in subsequent continental shelf cases. In the 1982 *Tunisia/Libya Case* the Court provided that UNCLOS (which was then in draft form) did not 'affect the role of the concept of natural prolongation in this domain'[63] and that natural prolongation 'was and remains a concept to be examined within the context of customary law and State practise'.[64] Moreover, the Court clarified that it was the natural prolongation as it is currently that matters, not its historical development:

> The function of the Court is to make use of geology only so far as required for the application of international law. It is of the view that what must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today; that just as it is the geographical

[58] *Case Concerning the Continental Shelf* (Libyan Arab Jamahiriya v. Malta) (Judgement) [1985] ICJ Rep. 13, 41, para. 49 (*Libya/Malta Case*).
[59] *Tunisia/Libya Case* (n 40) 61, para. 73.
[60] Ibid 46, para. 43.
[61] *North Sea Case* (n 26) 31, para. 43.
[62] See ibid 47, para 85(c) and 31-2, paras. 43-4.
[63] *Tunisia/Libya Case* (n 40) 49, para. 50.
[64] Ibid 46, para. 43.

> configuration of the present-day coasts, so also it is the present-day sea-bed, which must be considered. It is the outcome, not the evolution in the long-distant past, which is of importance.[65]

In the 1985 *Libya/Malta Case*, the ICJ, under the influence of UNCLOS, eliminated scientific considerations other than geometry from the establishment of the continental shelf within 200 nm. When accepting Malta's view on the natural prolongation concept the Court concluded:

> [S]ince the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role of geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceedings to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, *since at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question*, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by the way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial.[66]

It must be emphasised that the Court did not reject geoscientific considerations in areas beyond 200 nm. The Court was only concerned with the inner continental shelf. One of the consequences of this judgement is that natural prolongation lost its force as a primary issue in the jurisprudence of maritime boundary delimitations within 200 nm. It was not until 27 years after the ICJ's judgement that an international tribunal had the opportunity to further develop the natural prolongation concept as will be discussed below.

2.3.3. UNCLOS Provisions on the Establishment of the Continental Shelf

2.3.3.1. Introduction

'[O]ne of the principal objects and purposes of article 76 [of UNCLOS] is to define the precise outer limits of the continental shelf'.[67] The procedure it establishes 'is intended to result in permanent limits between the continental shelf and the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction'.[68] There are no precisely defined limits between the Area and a coastal State until a coastal State has established the outer limits of the continental shelf. In the event that the continental shelf extends beyond 200 nm 'article 76 contains a number of considerations to be taken into account in establishing the outer limit and requires the

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[65] Ibid 54, para. 61.
[66] *Libya/Malta Case* (n 58) 35, para. 39 (emphasis added).
[67] *Bay of Bengal Case* (n 4) 127, para. 435.
[68] Committee on '*Legal Issues of the Outer Limits of the Continental Shelf*' (the ILA Committee) (Preliminary Report) in International Law Association Report of the Seventy Conference, (New Delhi 2002) (International Law Association 2002) 741, 742 (2002 ILA Report).

coastal state to submit information to the' CLCS.[69] The article contains various terms of a geological and geomorphological nature.[70] As will be discussed below, ITLOS held in the *Bay of Bengal Case* that the continental shelf is a geomorphological concept.

It is important to notice from the beginning that 'article 76 is concerned with entitlement to and the establishment of the outer limits of the continental shelf and not the delimitation of overlapping entitlements between neighboring States'.[71] Article 76(10) clearly states that '[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts'. This means that article 76 is about delineation of the continental shelf, not delimitation.

The first paragraph of article 76 defines UNCLOS's continental shelf concept. Other provisions of the article are first and foremost concerned with the establishment of the outer limit of the continental shelf beyond 200 nm. This concerns both procedure and substance. These provisions are in fact among the most complex in UNCLOS.

2.3.3.2. UNCLOS Definition of the Continental Shelf

Article 76(1) is the introduction to UNCLOS's concept of the continental shelf. It reads:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the *natural prolongation* of its land territory to the *outer edge of the continental margin, or* to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[72]

From the wording of the provision it is clear that States can establish the continental shelf through two different methods. The latter method is used when the outer margin of the continental shelf does not exceed the 200 nm line. In those instances it is a geometrical measurement which creates the entitlement to the continental shelf. This means that the legal continental shelf concept has departed 'from the principle

[69] Ibid.
[70] The focus of geology is the solid earth and the rocks of which it is composed of while the focus of geomorphology is landforms and the processes that shape them.
[71] The ILA Committee (First Report) in International Law Association Report of the Seventy First Conference (Berlin 2004) (International Law Association 2004) 773, 810 (2004 ILA Report).
[72] Emphasis added.

that natural prolongation is the sole basis of the title'.[73] It is 'the distance from the baseline, measured on the surface of the sea' which 'is the basis for the title of the coastal State'.[74]

Another important provision is Article 76(3). It provides that '[t]he continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the *shelf*, the *slope* and the *rise*. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof'.[75] These four-component subdivisions of submarine morphology, i.e. the seabed and the subsoil of the shelf, the slope, the rise and the deep ocean floor, 'are involved in defining the continental margin of any kind of coastal State land mass, in accordance with article 76, paragraph 3, of the Convention'.[76]

As explained above, the natural prolongation concept has played an important role in the development of the continental shelf as a legal concept. ITLOS was the first tribunal to explain the meaning of the concept in cases beyond 200 nm:

> [T]he Tribunal is of the view that the reference to natural prolongation in article 76, paragraph 1, of the Convention, should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin. Entitlement to a continental shelf beyond 200 nm should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose.[77]

This means that the natural prolongation concept in UNCLOS does not constitute 'a separate and independent criterion a coastal State must satisfy in order to be entitled to a continental shelf beyond 200 nm'.[78] This also means, as Myanmar argued before the Tribunal, that 'the controlling concept is not natural prolongation but the "outer edge of the continental margin", which is precisely defined by … article 76,

[73] *Tunisia/Libya Case* (n 40) 48, para. 48.
[74] Ibid.
[75] Emphasis added.
[76] See Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission made by the United Kingdom of Great Britain and Northern Ireland in Respect of Ascension Island on 9 May 2008 (15 April 2010), 6, para. 23(i) (CLCS's Ascension Island (UK) Recommendations). A list of submissions, recommendations, preliminary information documents, executive summaries of submissions, diplomatic notes responding to submissions and other relevant material related to the work of CLCS is found on the Commission's website <http://www.un.org/depts/los/clcs_new/clcs_home.htm> accessed 16 July 2012.
[77] *Bay of Bengal Case* (n 4) 128, para. 437.
[78] Ibid 127, para. 435.

paragraph 4'.[79] The focus of article 76(4) is on geomorphology, not geology. Consequently, article 76 must be interpreted from a geomorphological perspective.

ITLOS supported its conclusion by noting that the wording '"the outer edge of the continental margin" is an essential element in determining the extent of the continental shelf"[80]; the precision of article 76(4);[81] that the term 'natural prolongation' is not found in subsequent paragraphs of article 76;[82] the interrelationship between para. 1 and 4[83]; and the practice of the CLCS.[84] It seems that the law of the sea has lost one of its more controversial concepts.[85]

Judge Gao strongly disagreed with the majority of the Tribunal on the interpretation of the natural prolongation concept. He is of the opinion that the interpretation of the majority is inaccurate and goes too far.[86] In his view it is Article 76(1) which is the controlling provision which 'defines the continental shelf and provides two bases for entitlement: natural prolongation and distance'.[87] Moreover, Gao noted that in reality the fundamental aspects of the definition of the continental shelf are found in paragraphs 1 and 3 and not paragraphs 1 and 4.[88] Furthermore, Gao stated: 'It is my firm view that natural prolongation retains its primacy over all other factors; and that legal title to the continental shelf is based … on geology and

[79] Ibid 125, para. 427.
[80] *Bay of Bengal Case* (n 4) 126, para. 429.
[81] Ibid 126-7, paras. 430-1 & 435.
[82] Ibid 127, para. 432. In his Separate Opinion Judge Gao criticised this argument and pointed out that '[b]y way of analogy, the concept of "common heritage of mankind" is enshrined in the Preamble of the Convention, but nowhere in the Convention is a clear and precise definition of the concept found. Yet, that does not prevent it from being one of the most important legal principles of the entire Convention as well as the basis for Part XI on the Area.' *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)* (Judgement) (Separate Opinion of Judge Gao) 2012
<http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/9-C16.sep_op.Gao.withmaps.orig.E.pdf> accessed 16 July 2012 [35, para. 85] (Separate Opinion of Judge Gao).
[83] *Bay of Bengal Case* (n 4) 127, para. 434.
[84] Ibid 127-8, para. 436. The Tribunal referred to the 'test of appurtenance' which is applied by the CLCS on the basis of article 76(4) 'to determine the existence of entitlement beyond 200 nm'. Ibid; See Doc. CLCS/11 (13 May 1999) 12, para. 2.2.6 & 13, para 2.2.8 (the Guidelines or the Scientific and Technical Guidelines).
[85] Arguably, this conclusion simplifies future maritime boundary litigations, in this field, since less amount of scientific and technical evidence needs to be validated.
[86] Separate Opinion of Judge Gao (n 82) 36, para. 87 & 40, para. 98.
[87] Ibid 36, para. 88.
[88] Ibid 37, para. 89.

geomorphology, at least as far as the continental shelf beyond 200 nm is concerned.'[89] It is unlikely that Judge Gao is alone in this opinion.

2.3.3.3. Crustal Types

The CLCS has taken the view that article 76 is neutral on the point of crustal types.[90] The Scientific and Technical Guidelines of the CLCS provide:

> Article 76 makes no systematic reference to the different types of the earth's crust. Instead it only makes reference to the two terms: 'the natural prolongation of … land territory' and 'the submerged prolongation of the land mass' of coastal States as opposed to oceanic ridges of the deep ocean floor. The terms 'land mass' and 'land territory' are both neutral terms with regard to crustal types in the geological sense.[91]

This view was confirmed in the *Bay of Bengal Case* when the question about the relevance of the origin of sediments arose for delimiting the continental shelf, as discussed in chapter five. The view is also confirmed in CLCS's recommendation with regard to the UK's submission in respect of Ascension Island. The recommendations provide that in general '[t]he principle of crustal neutrality applies: i.e. article 76 is neutral regarding the crustal nature of the land mass of a coastal State'.[92] This interpretation does not make a distinction between land territory which is continental in origin and that which is oceanic in origin, as may be the case for islands. This means that 'any kind of land mass (irrespective of crustal type, size etc.) of a coastal State has a continental margin that can be delineated in accordance with article 76, paragraph 4 of the Convention'.[93] If it was a requirement that the crustal nature of the natural prolongation must be continental then the consequence would be that article 121(2) of UNCLOS, which permits islands to generate their own maritime zones, and article 48 of UNCLOS, which permits archipelagos to claim the continental shelf, would be rendered irrelevant.

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[89] Ibid para. 91.

[90] Two different crustal types exist; continental crust and oceanic crust. Continental crust is the basement complex of rock, that is, metamorphosed sedimentary and volcanic rock with associated igneous rocks mainly granitic, that underlies the continents and the continental shelves. Oceanic crust is the portion of the outer, rigid part of the earth which underlies the oceans. The oceanic crust seems to be mostly a basalt layer, 5-6 km thick. Oceanic crust is thinner than continental crust, usually less than 10 km thick, although it is denser.

[91] The Scientific and Technical Guidelines (n 84) 54, para. 7.2.9.

[92] CLCS's Ascension Island (UK) Recommendations (n 76) 6, para. 22(iv).

[93] Ibid para. 23(ii).

2.3.3.4. The Foot of the Slope

A critical issue for a coastal State that is seeking to establish the continental shelf beyond 200 nm is to determine the location of the foot of the continental slope. Article 76(4)(b) of UNCLOS defines the foot of the slope in the following manner:

> In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

It must be noted 'that this is a geomorphological definition, open to displacement by geological evidence of where the boundary between continental crust and oceanic crust lies'.[94] When the foot of the slope is discussed it must be borne in mind that it is part of the 'continental slope province of the continental margin in the sense of the Convention'.[95] The Scientific and Technical Guidelines state:

> The Commission recognizes that the foot of the continental slope is an essential feature that serves as the basis for entitlement to the extended continental shelf and the delineation of its outer limits. According to paragraphs 4 (a) (i) and (ii) [of article 76], it is the *reference baseline* from which the breadths of the limits specified by formulae rules are measured.[96]

Furthermore the Guidelines provide:

> The Commission interprets the determination of the foot of the continental slope by means of the point of maximum change in gradient at its base, as a provision with the character of a general rule. The fundamental requirements posed by this provision are:
> - The identification of the region defined as the base of the continental slope; and
> - The determination of the location of the point of maximum change in the gradient at the base of the continental slope.[97]

The Guidelines define the base of the continental slope 'as a region where the lower part of the slope merges into the top of the continental rise, or into the top of the deep ocean floor where a continental rise does not exist'.[98] In one of its recommendations the Commission states that:

> The determination of a [foot of the slope] requires the existence of both a continental slope and an identifiable base to that slope ... In turn, the existence of a continental slope requires the existence of a distinct morphological feature rising from the level of the continental rise or deep ocean floor up to the continental shelf of the land mass of the coastal State.[99]

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[94] Andrew Serdy, 'The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate' (2011) 26 IJMCL 355, 358.
[95] CLCS's Ascension Island (UK) Recommendations (n 76) 6, para. 23(i).
[96] The Scientific and Technical Guidelines (n 84) 37, para. 5.1.1. (emphasis added).
[97] Ibid para. 5.1.3.
[98] Ibid 41, para. 5.4.5.
[99] CLCS's Ascension Island (UK) Recommendations (n 76) 6, para 23(iii). See a different opinion on this issue in the Paper Summarising the Presentation by the United Kingdom of Great Britain and Northern Ireland to the Commission on the Limits of the Continental Shelf on Points of Legal Interpretation made on 12 April 2010, 2, para. 6ff (UK Ascension Paper). Attached to Note No. 08/11. <http://www.un.org/depts/los/clcs_new/submissions_files/gbr08/gbr_nv_11jan2011.pdf> accessed 16 July 2012.

Although the foot of the slope is the key factor in the two methods used to determine the outer limits of the continental margin it can be rather difficult to locate it. One of the problems in locating the foot of the slope is that in some places there is more than merely a single change in the gradient at the base of the continental slope. In such instances the CLCS provides:

> [T]he Commission recognizes as a general rule the selection of the point of maximum change in the gradient as the method to identify the location of the foot of the continental slope. The selection of any other local change in the gradient at its base, i.e. any change other than the maximum, will be regarded by the Commission as an exception. The justification for the application of this exception will require the presentation of evidence to the contrary to the general rule …[100]

Bathymetric,[101] geomorphological, geological and geophysical sources of evidence can be used to locate the foot of the slope.[102] However, the CLCS prefers certain types of evidence.

> As a general rule, whenever the base of the continental slope can be clearly determined on the basis of morphological and bathymetric evidence, the Commission recommends the application of that evidence. Geological and geophysical data can also be submitted by coastal States to supplement proof that the base of the continental slope is found at that location ... The determination of the location of the point of maximum change in the gradient at the base of the continental slope will be conducted by means of the mathematical analyses of the two-dimensional profiles, three-dimensional bathymetric models and preferably both. Methods based on purely visual perception of bathymetric data will not be accepted by the Commission.[103]

Even though the CLCS does not agree with the location of some of the foot of the slope points, in a coastal State's submission, it is a possibility that the points accepted by the Commission are sufficient to establish the outer edge of the continental margin for that State.[104] It is therefore not vital for a coastal State to prove the correctness of the location of all foot of the slope points it has selected. That however depends on the circumstances in each case. There is variation in the importance of different foot of the slope points.

Article 76 is silent on how the location of the foot of the continental slope should be defined when evidence to the contrary to the general rule is invoked. The Virginia Commentary states that '[t]he phrase "in the absence of evidence to the contrary" implies that there may be special circumstances requiring the application of

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[100] The Scientific and Technical Guidelines (n 84) 42, para. 5.4.12.
[101] The focus of bathymetry is underwater depth of lake or ocean floors.
[102] The Scientific and Technical Guidelines (n 84) 37, para. 5.1.4.
[103] Ibid 41, paras. 5.4.6-7.
[104] See e.g. Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in Regard to the Submission made by Australia on 15 November 2004 (9 April 2008) 32, para. 110 (CLCS's Australia Recommendations).

alternative means for determining the foot of the continental slope'.[105] It has been noted that '[a]s the article is concerned with the definition of the foot of the slope, it will concern evidence, which indicates that the foot is located at another point than the point of maximum change in gradient at the base of the continental slope'.[106] The Convention does not mention any specific type of evidence that States must use in this context. Subsequently it seems as UNCLOS does not call for the use of any specific data. The Guidelines provide:

> The Commission interprets this provision as an opportunity for coastal States to use the best geological and geophysical evidence available to them to locate the foot of the continental slope at its base when the geomorphological evidence given by the maximum change in the gradient as a general rule does not or can not locate reliably the foot of the continental slope.[107]

Moreover, '[t]he Commission interprets the determination of the foot of the continental slope when evidence to the contrary to the general rule is invoked as a provision with the character of an exception to the rule'.[108] This interpretation about the primacy of the maximum change in gradient rule over the evidence to the contrary rule is confirmed in CLCS's recommendations with regard to the submission made by Barbados which provided that 'it did not agree with the methodology used in the Submission to determine the critical [foot of the slope] points, based on evidence to the contrary. The subcommission was of the view that these [foot of the slope] points could be determined on the basis of the general rule (maximum change in the gradient).'[109] The International Law Association's Committee on the Legal Issues of the Continental Shelf[110] has a different understanding of this issue. It is of the opinion that '[t]he maximum change in gradient rule is applicable in the absence of evidence to the contrary. If the latter type of evidence on the location on the foot of the slope exists, the maximum change in gradient rule is not applicable'.[111]

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[105] Satya Nandan & Shabtai Rosenne (eds.) *United Nations Convention on the Law of the Sea; A Commentary*, Vol. II (Martinus Nijhoff 1993) 876.
[106] 2004 ILA Report (n 71) 794.
[107] The Scientific and Technical Guidelines (n 84) 44, para. 6.1.10.
[108] Ibid 43, para. 6.1.2.
[109] Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Barbados on 8 May 2008 (15 April 2010), 3, para. 14 (Barbados Recommendations).
[110] Hereinafter ILA Committee.
[111] The ILA Committee (Second Report) in International Law Association Report of the Seventy Second Conference (Toronto 2006) (International Law Association 2006) 215, 223.

As mentioned above, the CLCS views the foot of the slope as 'an essential feature that serves as the basis for ... the delineation of its outer limits'.[112] As will be discussed in chapter five, it is possible to argue that the foot of the continental slope can serve as the basis for the provisional equidistance line in continental shelf delimitations beyond 200 nm between adjacent and opposite States.

2.3.3.5. The Outer Limits of the Continental Margin

Since the continental rise can extend up to 900 nm some limits were deemed necessary to protect the territorial scope of the Area.[113] Article 76(2) of UNCLOS provides that '[t]he continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6'. The provision is only of relevance in case there is a natural prolongation beyond 200 nm. It must be noted that '[i]n some areas there may be a choice between different outer limit lines applying paragraphs 4 to 6'.[114] In these instances it is '[o]nly the coastal State [which] is competent to make such a choice when it makes a submission to the CLCS or when it establishes the outer limit of its continental shelf on the basis of the recommendations of the Commission'.[115] Beyond the limits, provided in paras. 4-6, '[n]o State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof'.[116] Moreover, '[n]o such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized'.[117] It follows from article 76(2) that '[t]he absence of outer limits of the continental shelf established in accordance with article 76 does not give the coastal State the right to exercise rights over' the continental shelf beyond 200 nm.[118] Moreover, '[t]he absence of a reference to paragraphs 7 to 9 of article 76 indicates that article 76(2) is also operative and binding on a coastal State before these provisions have been implemented by it'.[119]

As explained above, the 'outer edge of the continental margin' is the controlling concept of article 76. The concept is defined in para. 4. The provision

[112] The Scientific and Technical Guidelines (n 84) 37, para. 5.1.1.
[113] Serdy 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 357.
[114] 2004 ILA Report (n 71) 792.
[115] Ibid 792-3.
[116] Article 137(1) of UNCLOS.
[117] Ibid.
[118] 2004 ILA Report (n 71) 792.
[119] Ibid.

'introduces specific formulae to enable the coastal State to establish precisely the outer edge of the continental margin'. [120] Its application will make a State able 'to identify the precise location of the outer edge of the continental margin'.[121] Article 76(4)(a) provides two methods of defining its outer edge, whilst it is difficult and expensive to obtain the data needed for the former method, the latter is satisfied by geometric measurements.[122] Both methods have in common that the location of the outer edge of the continental margin is found through measurements from the foot of the slope. It is provided that:

> For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
>
> (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

Gardiner, a geologist in the Irish delegation at the Third Conference, developed the sediment thickness formula found in para. 4(a)(i). During the Conference it was referred to as the 'Irish Formula'. The purpose of the formula 'was to ensure that coastal State sovereign rights would extend to a major portion of the continental rise where significant hydrocarbon resources were expected to exist'.[123] To explain the method the following example is often made:

> In effect, paragraph 4(a)(i) establishes a ratio of thickness of sedimentary rocks to distance from the foot of the continental slope at a minimum of 1 to 100 (0.01). For example, if the outer limit is to be established at 100 miles from the foot of the slope, the sedimentary rocks must [be] at least 1 mile thick. The figure of one percent was chosen so that coastal States would retain under their jurisdiction a significant part of the continental rise.[124]

Problematically:

> [I]n certain cases sedimentary rocks will not be distributed evenly and there may be more than one point on a profile line that meets the 1 per cent criterion. The inclusion of the word 'outermost' in paragraph 4(a)(i) indicates that the coastal State is not obliged to select the point that meets the 1 per cent criterion that is situated most landward, but may select another point that meets the 1 per cent criterion seaward of that most landward point.[125]

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[120] *Bay of Bengal Case* (n 4) 126, para. 430.
[121] Ibid 127, para. 431.
[122] Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 358.
[123] Robert Smith & George Taft, 'Legal Aspects of the Continental Shelf' in Peter Cook & Chris Carleton (eds.) *Continental Shelf Limits: The Scientific and Legal Interface* (Oxford University Press 2000) 17, 19.
[124] Nandan & Rosenne vol. II (n 106) 878.
[125] 2004 ILA Report (n 71) 795-6.

The Scientific and Technical Guidelines provide that 'for each of the fixed points chosen the Commission expects documentation of the continuity between the sediments at those points and the sediments at the foot of the continental slope'.[126] The ILA Committee submits 'that the requirement of continuity is met if a fixed point is located within the outer edge of the continental margin'.[127]

The formula in para. 4(a)(ii), is named after Hollis Hedberg, an American geology professor and consequently often referred to as the 'Hedberg formula'. Hedberg called the continental slope a '"prominent worldwide geomorphic feature" which would serve as the logical and equitable guide to the precise boundary between national and international jurisdiction'.[128] He argued that his formula did 'not aim to secure areas of favourable petroleum prospects, manganese nodules, or other resources either to coastal state or international jurisdiction'.[129] He pointed out that '[i]t simply tries to provide the most natural, logical, appropriate, and feasible boundary between the two'.[130] Since it is difficult to determine the exact base of the continental slope, Hedberg proposed that a boundary zone should be established beyond the base of the continental slope.[131] Hedberg 'took 100 kilometres as the "minimum technically practical width of the boundary zone," which translates roughly to 60 nautical miles'.[132] Once the foot of the slope is established the additional task of drawing a line 60 nm therefrom should not prove problematic. It is important to notice that 'the [foot of the slope] must be situated more than 140 M from the territorial sea baselines in order to establish an outer edge of continental margin beyond 200 M using the 60 M distance formula'.[133]

Para. 7, which is applicable to both methods, provides that:

> The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is

[126] The Scientific and Technical Guidelines (n 84) 67, para. 8.5.3.
[127] 2004 ILA Report (n 71) 796.
[128] Nandan & Rosenne vol. II (n 106) 878-9.
[129] Hedberg (n 51) 137.
[130] Ibid.
[131] Nandan & Rosenne vol. II (n 106) 879.
[132] Ibid.
[133] CLCS's Ascension Island (UK) Recommendations (n 76) 12, para. 44.

> measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.[134]

Serdy has pointed out that '[t]he consequence of this simplification may be that areas of oceanic crust or deep seabed fall within a coastal State's (legal) continental shelf despite paragraph 3, or more rarely that areas of continental crust remain outside it – although the latter is more typically the result of the cut-offs of paragraph 5'.[135] CLCS has provided, controversially, how the continental shelf beyond 200 nm is to be connected with the 200 nm line. The CLCS's recommendations regarding Australia's submission provide that:

> [T]he Commission is of the view that the determination of the last segment of the outer limits of the continental shelf shall be established either by the intersection of the formula line, in accordance with article 76, paragraphs 4 and 7, and the 200 M limit from the baselines ... or it shall be determined by the line of shortest distance between the last fixed formula point and 200 M limit. In all cases, the segment cannot exceed 60 M in length in accordance with article 76, paragraph 7.[136]

The question has been raised 'whether a fixed point which meets the requirements of paragraph 4 can be linked to a point on the 200 nautical mile limit, which does not meet these requirements'.[137] The ILA Committee states that

> [A]ll fixed points used to construct a line in accordance with article 76(7) in principle have to meet either one or the other of these requirements. The employment of a fixed point which is located on the 200 nautical mile limit but does not meet these requirements cannot be used as one of the fixed points to delineate the outer limit of the continental shelf where the shelf extends beyond 200 nautical miles.[138]

The Statement of Understanding Concerning a Specific Method to Be Used in Establishing the Outer Edge of the Continental Margin[139] contains an exception to article 76(4) of UNCLOS which is not mentioned in the Convention. The exception was intended to address the unique geographic conditions of the ocean floor of Sri Lanka in the Bay of Bengal, where the formation of sedimentary rocks is such that the application of the Irish formula would result in an inequitably small legal shelf.

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[134] The paragraph is complemented by article 84(1) of the Convention which notes that '[w]here appropriate, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines of delimitation'.

[135] Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 359, fn. 14.

[136] CLCS's Australia Recommendations (n 104) 2, para. 8. See also paras. 19, 35, 54, 67, 77, 90, 106 & 144. This interpretation of article 76(7) has been criticised heavily. See Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 373-5.

[137] 2004 ILA Report (n 71) 795.

[138] Ibid.

[139] See Annex II of the Final Act of UNCLOS which contains a statement of understanding which considers a specific case of geographical characteristics that was accepted by the Third Conference. It is linked to the provisions of the Convention through article 3(1)(a) of Annex II. Nandan & Rosenne vol. II (n 106) 1020.

According to the Virginia Commentary the Statement only applies to Sri Lanka and possibly the south-eastern coast of India.[140] It must however be noted that not only India but also Kenya and Myanmar have referred to it in their submissions to the CLCS.[141] This causes a legal problem with which the CLCS will in the future be faced.[142]

2.3.3.6. The Maximum Extent of the Continental Margin

Article 76(5) introduces two constraints which limit the extent of the continental shelf.

> The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

The continental shelf beyond 200 nm is therefore limited by a certain distance from the baselines, i.e. 350 nm – or a mixed criterion of distance and depth – that is 100 nm from the 2,500 m isobaths. If the 100 nm+2500 isobath limitation is used it is possible that the outer limits of the continental shelf extend beyond 350 nm. It must be emphasised that these lines do not create any rights. Their purpose is to limit the possible maximum area that can be claimed by a coastal State on the basis of article 76(4) of UNCLOS. It falls to the coastal State to decide which line of limitation it uses. It can choose to use them both, whichever is further, with the aim of gaining a larger piece of the continental shelf beyond 200 nm. It is important to note that '[f]or any continental margin, there will only be one line at 350 nautical miles from the baselines. However, there are areas of the seabed where a number of consecutive 2,500 meter isobaths occur'.[143] The Scientific and Technical Guidelines provide that '[s]uch situations arise as a result of geological and tectonic processes shaping the present continental margins. They can create multiple repetitions of the 2,500 m isobaths, for example, by faulting, folding and thrusting along continental

[140] Nandan & Rosenne vol. II (n 106) 1024.
[141] See Republic of India, Partial submission to the Commission on the Limits of the Continental Shelf (May 11 2009) 2, para. 5; Republic of Kenya, Submission on the Continental Shelf Beyond 200 Nautical Miles (6 May 2009) 5, paras. 1-6; Union of Myanmar, Submission on the Continental Shelf Beyond 200 Nautical Miles (16 December 2008) 1.
[142] Surya Subedi, 'Problems and Prospects for the Commission on the Limits of the Continental Shelf in Dealing with Submissions by Coastal States in Relation to the Ocean Territory Beyond 200 Nautical Miles' (2011) 26 IJMCL 413, 429.
[143] 2004 ILA Report (n 71) 797.

margins.'[144] It has been argued that '[n]othing in the Convention precludes a State from using the 2500-meter isobath most advantageous to its interests'.[145] The Guidelines provide, however, that '[u]nless there is evidence to the contrary, the Commission may recommend the use of the first 2,500 m isobaths from the baselines from which the breadth of the territorial sea is measured that conforms to the *general configuration* of the continental margin'.[146] In this context it must be noted that:

> A number of publications support the interpretation that a 2500 meter isobath can only be employed by a State if it is situated in the natural prolongation of its land territory. This is confirmed by the drafting history of article 76, which indicates that proposals to include a reference to water depth in the article in general were justified by the argument that they reflected the foot of the slope of or the outer limit of the natural prolongation of the land territory.[147]

When considering Norway's submission regarding the Arctic Ocean and the Barents Sea, the CLCS adopted the peculiar position that the 2500-metre isobath constraint line had to be landward of the foot of the continental slope,[148] although there is nothing in UNCLOS that supports this interpretation.[149]

To exclude the possibility of States making enormous claims to the outer continental shelf, article 76(6) provides the following:

> Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

Para. 6 does not define what is meant by the term 'submarine ridges'; nor does any other provision of UNCLOS. This is one of the most controversial issues regarding the establishment of the continental shelf beyond 200 nm.[150] What is at least clear is that a distinction must be made between submarine ridges and oceanic ridges on the deep ocean floor. According to article 76(3), oceanic ridges are not part of the continental shelf. A distinction must also be made between submarine ridges and

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[144] The Scientific and Technical Guidelines (n 84) 36, para. 4.4.2.
[145] Smith & Taft (n 123) 20.
[146] The Scientific and Technical Guidelines (n 84) 36, para 4.4.2 (emphasis added).
[147] 2004 ILA Report (n 71) 798-9.
[148] See Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission made by Norway in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006 (27 March 2009) 27, para. 74 (CLCS's Norway's Arctic Ocean and Barents Sea Recommendations).
[149] The area that Norway loses as a result of this is so small that it is very unlikely that it will cause any commotion in that regard. See Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 372-3. Other States that will possibly be affected by this interpretation in the future could, however, be less passive in that regard.
[150] See e.g. Subedi (n 142) 421; Llewellyn (n 19) 681.

submarine elevations, since submarine elevations that are natural components of the continental margin do not fall under the 350 nm limitation as submarine ridges. Moreover, it must be noted that the list of submarine elevations in para. 6 is 'illustrative and not exhaustive'.[151] The distinction between submarine ridges and elevations is particularly important for some coastal States who can claim a continental shelf area beyond the 350 nm limit with the 100 nm+2500 isobath line in the event that a seabed feature is defined as a submarine elevation rather than a submarine ridge. Some critical issues regarding the CLCS's interpretation of the provisions relevant to ridges will be discussed in the next chapter.

2.3.4. Coastal States' Rights and Duties in the Continental Shelf

It was famously stated by the ICJ in the *North Sea Case*:

> [T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.[152]

Article 77 of UNCLOS deals with the rights of the coastal State over the continental shelf. The article's substance is the same as article 2 of the 1958 Continental Shelf Convention. According to para. 1 '[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources'. It is important to note that the paragraph mentions sovereign rights and not sovereignty. This means that coastal States have limited sovereignty in the continental shelf, that is to say, the continental shelf is not a zone of sovereignty.[153] It is a zone where States enjoy sovereign rights. Article 77(2) echoes the *North Sea Case* and provides that '[t]he rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent

[151] Nandan & Rosenne vol. II (n 106) 881.
[152] *North Sea Case* (n 26) 22, para. 19.
[153] See *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea v. Guinea-Bissau)* (Arbitration Tribunal) (1986) 25 ILM 252, 302, para. 124 (*Guinea/Guinea-Bissau Case*).

of the coastal State'. Article 77(4) defines the natural resources, which part VI of UNCLOS – the part regarding the Continental Shelf – refers to as consisting of:

> [T]he mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.[154]

Consequently, the sovereign rights of the coastal States only apply to natural resources. Contrary to land territory, article 77(3) provides that '[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation'. These rights 'over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters'.[155]

A few other provisions of UNCLOS are also of relevance in this context. Article 80 provides a coastal state with the right to erect and regulate artificial islands, installations and structures on the continental shelf. Article 246 contains rules regarding the right to regulate research in the EEZ and on the continental shelf, by the coastal state.[156] Moreover, article 79 contains a rather imprecise right to regulate the laying of submarine cables and pipelines on the continental shelf.

The substance of article 82 of UNCLOS was new in international law. It must be seen in connection with article 76. The definition and limits of the continental shelf were negotiated together with the requirement to share the revenues of the continental shelf. It is very unlikely that article 76 would have been concluded if article 82 was not part of the package deal. Article 82(1) provides that '[t]he coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles'. The

[154] Article 68 of UNCLOS notes that Part V of UNCLOS regarding the EEZ 'does not apply to sedentary species as defined in article 77, paragraph 4'.
[155] Article 78(1) of UNCLOS.
[156] It must be underlined that article 246 makes a distinction in regulatory rights between the inner and outer continental shelf. Under article 246(5)(a) a coastal states can exclude 'a marine scientific research project of another State or competent international organization' to take place in the EEZ or the inner continental shelf if the project 'is of direct significance for the exploration and exploitation of natural resources, whether living or non-living'. The situation is however different in the outer continental shelf. According to article 246(6), coastal states 'may not exercise their discretion to withhold consent ... in respect of marine scientific research projects to be undertaken' beyond 200 nm 'outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time.'

provision clearly provides *a contrario* that living resources are excluded from the payment scheme. Article 82(2) defines the payment duty further:

> The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. Production does not include resources used in connection with exploitation.

According to article 82(4) '[t]he payments or contributions shall be made through the Authority,[157] which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them'. Para. 3 protects the interests of developing States in this context and provides that if such a State 'is a net importer of a mineral resource produced from its continental shelf [it] is exempt from making such payments or contributions in respect of that mineral resource'. The process described in article 82 has not yet been activated.

2.4. The Delimitation of the Continental Shelf between Adjacent or Opposite Coastal States

2.4.1. Amputation of Entitlement

Delimitation is in essence a simple act. It can be defined as consisting of 'drawing a demarcation line, a boundary, between two neighbouring States when the geographical situation does not allow both the parties concerned to enjoy their title to its full extent'.[158] What complicates this act is that many statesmen view territory as power and loss of power as weakness. Because '[t]he drawing of frontiers both on land and at sea must always entail restrictions on the extensions of a country's territorial expanse'[159] it is, in the words of Weil, 'a painful process since, by its very definition, it implies an amputation of the area which each of the States involved could hope to appropriate if it faced the oceans on its own'.[160] Borders, land or maritime, are after all 'not merely lines on the ground, or ways of delimiting spheres of public jurisdiction, but serve also to delimit the existence of a political order by

[157] The Authority acts on the behalf of mankind in whom the resources of the Area are vested. See UNCLOS article 137(2).
[158] Prosper Weil, *The Law of Maritime Delimitation – Reflections* (Maureen MacGlashan tr, Cambridge Grotius Publications Limited 1989) 48.
[159] *Tunisia/Libya Case* (n 40) 317 (Dissenting Opinion of Jens Evensen).
[160] Weil, *The Law of Maritime Delimitation* (n 158) 5.

means of its separation from others'.[161] Even though boundary issues have triggered serious disputes and even great wars throughout previous centuries Oxman has importantly noted that 'maritime boundary issues do not normally seem to engage the same level of political attention as many disputes over land territory'.[162] The reason for this is that 'resultant agreements are often viewed as economic or technical. Indeed, it can be argued that few maritime boundary agreements are regarded as overwhelmingly political'.[163] However, in some instances, especially when natural resources are involved, boundary delimitations have caused severe turbulence in the relationships between States.

A clear difference must be made between land boundaries and continental shelf boundaries for the reason that 'the process by which a court determines the line of a land boundary between two States can be clearly distinguished from the process by which it identifies the principles and rules applicable to the delimitation of the continental shelf'.[164] Factors such as occupation, the effective exercise of State sovereignty, acts of sovereignty 'help to determine which title is the better and hence legally the only one in the context of land delimitation'.[165] These factors play no part in continental shelf delimitations, however, since as was clearly stated in the *North Sea Case*, the right to the continental shelf does not depend on it being exercised.[166]

There are nevertheless similarities between land and maritime boundaries. For example the ICJ drew an analogy between land and maritime boundaries in the *North Sea Case*, noting that, as with land boundaries, maritime boundaries may remain undefined over quite long periods of time without this uncertainty affecting the rights of States concerned.[167] Moreover, the Court stated in the *Aegean Sea Case* that '[w]hether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary

[161] Matthew Craven, 'Statehood, Self-determination and Recognition' in Malcolm Evans (ed.) *International Law* (3rd. edn, Oxford University Press, 2010) 203, 224.
[162] Bernard Oxman, 'Political, Strategic and Historical Considerations' in IMB 1 (n 22) 3, 12.
[163] Ibid.
[164] *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* (Judgement) [1986] ICJ Rep. 554, 578, para. 47.
[165] Weil, *The Law of Maritime Delimitation* (n 158) 92.
[166] *North Sea Case* (n 26) 22, para. 19.
[167] Ibid 32, para. 46. It must, however, be noted that '[u]nsettled maritime boundaries can lead to discord, conflict, and poor resource and environmental management'. Charney, 'Introduction' (n 22) xxv.

agreements from fundamental change of circumstances'.[168] The interrelationship between land and maritime boundaries is especially clear for adjacent coastal States. For such States 'the intersection of the land boundary with the sea constitutes the starting point for the maritime boundary'.[169] It should therefore not be surprising that '[a]djacent states sometimes argue that a maritime boundary should be established by extending the land boundary in the same direction out to sea'.[170]

When the only maritime zone was the three nm territorial sea the need for maritime boundaries was limited and mainly relevant to States adjacent to one another. The expansion of maritime zones since 1945 has increased the need for maritime boundaries, not only between adjacent States but also between those opposite others.[171] The current treaty regime on maritime boundary delimitation is found in UNCLOS. The provisions on the delimitation of the continental shelf and the EEZ are identical and were subject to the same arguments and developed in the same way at the last minutes of the Third Conference.[172] They differ 'only in respect of the designation of the maritime area to which they apply'.[173] Articles 74(1) and 83(1) of the Convention provide the basic principle for delimiting the EEZ and the continental shelf:

> The delimitation of the [EEZ/continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.[174]

The Tribunal in the *Barbados/Trinidad & Tobago Case* made the following statement regarding the provision:

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[168] *Aegean Sea Case* (n 57) 35-6, para. 85. Article 62(2)(a) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 311 (VCLT) provides that a 'fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty … if the treaty establishes a boundary'.

[169] Oxman, 'Political, Strategic and Historical Considerations' (n 162) 30.

[170] Ibid 32.

[171] Churchill & Lowe (n 18) 181.

[172] See Weil, *The Law of Maritime Delimitation* (n 158) 116. The ICJ has referred to this as 'the symmetry of the two texts, relating to the delimitation of the continental shelf and of the [EEZ]'. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* (Judgement) [1984] ICJ Rep. 246, 295, para. 96 (*Gulf of Maine Case*). It must be noted that in more recent international litigation the parties have requested delimitation of a single maritime boundary for the EEZ and the continental shelf. A single maritime boundary is not possible in the case of the continental shelf beyond 200 nm since the EEZ does not extend beyond that distance.

[173] *Bay of Bengal Case* (n 4) 60, para. 182.

[174] Although the provisions 'explicitly address delimitation agreements, they also apply to judicial and arbitral delimitation decisions'. See e.g. ibid 61, para 183.

> This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.[175]

If negotiations on an agreement are not fruitful, paras. 2 and 3 of the same articles include procedures applicable where there is no agreement. Of these paragraphs, para. 2 is of greater importance. It provides that '[i]f no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV [the dispute resolution part of UNCLOS]'. It must however be emphasised, as will be discussed in chapter four, that States can, according to article 298(1)(a)(i) of the Convention, exclude themselves by declaration from settling maritime boundary disputes by compulsory third-party means.

Articles 74(1) and 83(1) are the product of failure on the part of the Third Conference to reach any consensus on the method to be used in delimiting the EEZ and the continental shelf. Churchill and Lowe have noted:

> UNCLOS III had great difficulty in finding acceptable provisions concerning the delimitation of the continental shelf and the EEZ. Participants at the Conference divided into two broad camps, those who favoured equidistance (with an exception for special circumstances) as the primary principle of delimitation and those who wanted the emphasis placed on equitable principles, with no mention being made on equidistance. Negotiations on the matter were very protracted, and the resulting compromise is not very meaningful…[176]

Weil argued that the provisions are 'so empty of meaning that they are almost non-provisions'.[177] Others have adopted a more positive view. Philip Allott stated that 'the reference to international law and to Article 38 of the Statute must be given some meaning':[178]

> It must be taken to be legislation by means of a symbolic formula. It is saying that the process of delimitation must be conducted in the light of the principles that have been evolved by international law and that, for this purpose, international law must be understood in a special extended sense to include not only fully formed international law but also the material found in formative sources of international law (such as prenormative state practice, judicial decisions, general principles of law). The vital point to understand about such symbolic formula is that it does not transform all there heterogeneous materials into international law by the legislative act of the Convention. It is *not* merely legislation by reference. The complete ragbag of such materials does *not* together constitute the 'UNCLOS substantive rule' on delimitation. What the Convention

[175] *Barbados/Trinidad & Tobago Case* (n 4) 836-7, para. 222.
[176] Churchill & Lowe (n 18) 191.
[177] Weil, *The Law of Maritime Delimitation* (n 158) 148. Interestingly, article 15 of UNCLOS, which contains the provision on the delimitation of the territorial sea, makes direct references to the equidistant line, special circumstances and historic title.
[178] Philip Allott, 'Power Sharing in the Law of the Sea' (1983) 77 AJIL 1, 22.

> does is to set the parameters of the delimitation *process*. Those parameters are finite in number and kind but not wholly specific. They are not wholly specific, but they are exclusive.[179]

On this issue, the ICJ in the *Libya/Malta Case* stated that UNCLOS 'sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to the States themselves, or to the courts, to endow this standard with specific content.'[180] Malcolm D. Evans has pointed out that UNCLOS 'devolves the development of rules and principles of delimitation to general international law, and so any comment on the future of delimitation is a matter that must be considered in the wider context of the law of the sea, rather than through the terms of the LOSC itself.'[181] In his declaration in the *Bay of Bengal Case*, Wolfrum states that 'it is the task, and even the responsibility of international courts and tribunals (when requested to settle disputes) to develop the methodology that is suitable for this purpose'.[182] This responsibility is further discussed in chapter four and five.

2.4.2. An Agreement on the Basis of International Law

Article 74(1) and 83(1) create a flexible procedural framework for maritime boundary delimitations. It has been noted that '[t]he reference to delimitation by agreement clarifies that, even though the act of delineating the outer limits of the [EEZ/continental shelf] is usually performed unilaterally, when there are overlapping claims the States concerned must be prepared to enter into negotiations in the matter'.[183] The jurisprudence of international courts and tribunals envisages that it is a crystal clear rule of international law that a maritime boundary cannot be conducted unilaterally. They must be determined bi- or multilaterally. Anderson has pointed out that '[t]he principle of the non-use of force entails that boundaries may not be

[179] Ibid 22-3.
[180] *Libya/Malta Case* (n 58) 30-1, para. 28.
[181] Malcolm Evans, 'Maritime Boundary Delimitation: Where Do We Go From Here?' in David Freestone, Richard Barnes & David Ong (eds.) *The Law of the Sea: Progress and Prospects* (Oxford University Press 2006) 137, 138.
[182] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)* (Judgement) (Declaration of Judge Wolfrum) 2012 <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/4-C16.decl.Wolfrum.orig.E.pdf> accessed 16 July 2012 [1] (*Declaration of Judge Wolfrum*).
[183] Nandan & Rosenne vol. II (n 106) 813, 982.

imposed unilaterally, whether by force or by making national claims'.[184] The ICJ, in the 1982 *Tunisia/Libya Case*, stated:

> [A]n attempt by a unilateral act to establish international maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law, as laid down, *inter alia*, in the Geneva Conventions of 1958 on the Law of the Sea, especially the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf, which provide that maritime boundaries should be determined by agreement between the Parties. This principle has been retained in the draft convention on the Law of the Sea.[185]

The Court provided in the 1984 *Gulf of Maine Case* that:

> No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result.[186]

The ICJ detailed in the 1969 *North Sea Case* what was implied by the duty to negotiate and stated that one of the ideas which has 'always underlain the development of the legal régime of the continental shelf' is that

> the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will both be the case when either of them insists upon its own position without contemplating any modification of it.[187]

Moreover, the Court provided that the obligation to negotiate 'constitutes a special application of a principle which underlies all international relations, and which is moreover recognized … as one of the methods for the peaceful settlement of international disputes'[188] in the Charter of the United Nations.[189] It must be noted that the obligation to negotiate is 'not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements ... But an obligation to negotiate does not imply an obligation to reach an agreement'.[190] In short, States have to negotiate in good faith without being obliged to conclude a maritime boundary agreement.

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[184] David Anderson, 'Developments in Maritime Boundary Law and Practice' in David Colson & Robert Smith (eds.) *International Maritime Boundaries* vol. V (Martinus Nijhoff 2005) 3197, 3221 (hereinafter IMB 5).
[185] *Tunisia/Libya Case* (n 40) 66-7, para. 87.
[186] *Gulf of Maine Case* (n 172) 299, para. 112.
[187] *North Sea Case* (n 26) 47, para. 85(a).
[188] Ibid 47, para. 86.
[189] Charter of the United Nations (adopted 26 June 1945; entered into force 24 October 1945) 1 UNTS xvi (UN Charter).
[190] *Railway Traffic between Lithuania and Poland* (Advisory Opinion) [1931] PCIJ Rep Series A/B No. 42, 108, 116.

As aforementioned, the agreements States are supposed to conclude are to be on the basis of international law as referred to in article 38 of the Statute of the ICJ. In the opinion of Charney this 'reference to international law provides an ambiguous connection to the old language [of the Geneva Conventions] and customary international law'.[191] The reference to article 38 means that the agreements mentioned in articles 74 and 83 can be based on whatever source of international law the negotiating parties want to use; there is no limit in this regard. The question can be asked as to whether any consequences follow from a boundary agreement not based on international law. Whilst it is clear that a boundary agreement cannot be based on geometry or religious texts alone, it remains uncertain what consequences follow from an agreement merely based on something other than international law. Neither UNCLOS nor the VCLT provide an answer in this regard. It could be argued that this was such a fundamental fault that the maritime boundary agreement could not be binding. That conclusion would not, however, benefit the stability and predictability of international relations. Since this issue has not proved problematic in practice, it will be left unanswered.

2.4.3. Equitable Principles and Equidistance

As aforementioned the participants of the Third Conference divided into two groups; of equidistance supporters (with an exception for special circumstances) and supporters of equitable principles. This was not division characterising the Third Conference only; indeed it has characterised the whole history of EEZ/continental shelf boundary delimitations. It can be said that the main difference between these methods is that the equidistance method is more predictable and easier to execute whilst the equitable principles method lays greater stress 'on the unique and specific character of each factual situation'.[192]

Equitable principles are problematic to define.[193] That is probably because 'nobody has ever really known what an "equitable principle" of delimitation was or is'.[194] Nevertheless, '[t]he concept of equitable principles implies a judgement on ... elements of fact and a particular view of the purpose of delimitation ... Equitable

[191] Charney, 'Introduction' (n 22) xxviii.
[192] Weil, *The Law of Maritime Delimitation* (n 158) 191.
[193] A few equitable principles are mentioned in the *Libya/Malta Case* (n 58) 39, para. 46.
[194] Evans (n 181) 144.

principles exist on the level of value judgements. They are man-made.'[195] Even though the concept has been criticised for lack of clarity a few basic facts regarding it seem clear. *First* of all, '[e]quity does not necessarily imply equality'.[196] In other words:

> There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline.[197]

Second, equitable principles are not synonymous with equity in the abstract. In delimitation 'it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles'.[198] Even though 'the delimitation ... must be equitable, it cannot have as its object simply the awarding of an "equitable share" in the continental shelf to each Party'.[199] The ICJ in the *Tunisia/Libya Case* stated that '[e]quity as a legal concept is a direct emanation of the idea of justice' and it 'is a general principle directly applicable as law'.[200] The Court in the *Libya/Malta Case* provided that the application of equity as a legal concept 'should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application'.[201] *Third*, the '[a]pplication of equitable principles is to be distinguished from a decision *ex aequo et bono*'.[202] Thirlway is of the opinion that '[e]quity is probably best regarded, in words applied by the International Court to the comparable principle of good faith, as one of the basic principles governing the creation and performance of legal obligations, but "not in itself a source of obligation where none would otherwise exist"'.[203] Philip Allott states convincingly:

> The concepts of 'equitable principles' and 'equitable solutions' are playing in this context a role analogous to that played by 'reasonableness' in English law. They are high-level power modifiers

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[195] Weil, *The Law of Maritime Delimitation* (n 158) 211.
[196] *North Sea Case* (n 26) 49 para. 91.
[197] Ibid 49-50 para. 91.
[198] Ibid 47, para. 85.
[199] *Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK v. France)* (1977) 18 RIAA 3, 49, para. 78 (*Anglo-French Case*).
[200] *Tunisia/Libya Case* (n 40) 60, para. 71.
[201] *Libya/Malta Case* (n 58) 39, para. 45.
[202] *Tunisia/Libya Case* (n 40) 60, para. 71.
[203] Hugh Thirlway, 'The Sources of International Law' in Malcolm Evans (ed.), *International Law* (3rd edn, Oxford University Press 2010) 95, 117.

> whose referent is a subtle amalgam of an attitude or approach (fairness, common sense) and evolved artificial legal principles. Those principles are both abstract and situational.[204]

The ICJ has noted:

> [T]here is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others.[205]

The application of equitable principles to the facts of each maritime delimitation case 'starts from relevant circumstances and, applying equitable principles, arrives immediately at an equitable line. The delimitation exercise rests on the autonomous concept of equity and looks only to the final outcome: the facts lead straight to the desired result.'[206] It is the end result – not the method – that is the prime issue.

The equidistance/relevant circumstances approach is quite different from the equitable principles approach. In essence it consists of two stages: An equidistance line and relevant circumstances. The equidistance line has been described as a line 'which leaves to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party'.[207] Such line 'may consist either of a "median" line[208] between "opposite" States, or of a "lateral" line between "adjacent" States'.[209] The first stage in the equidistance/relevant circumstances method is to draw a provisional equidistance line in the disputed area. Then, relevant circumstances specific to the case in question are examined to assess the equity of the result of the first stage. After this examination, the equidistance line is either confirmed or the line is adjusted to take account of any special circumstances.[210] A third stage was recently

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[204] Allott (n 178) 23.
[205] *North Sea Case* (n 26) 50, para. 93.
[206] Weil, *The Law of Maritime Delimitation* (n 158) 191.
[207] *North Sea Case* (n 26) 17, para. 6.
[208] The ICJ has defined the median line as 'boundaries drawn between the continental shelf areas of "opposite" States, dividing the intervening spaces equally between them'. Ibid 14, para. 4. In the maritime delimitation in the Black Sea between Romania and Ukraine the Court provided that '[s]o far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. No legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation is the same for both.' *Black Sea Case* (n 56) 101, para. 116.
[209] *North Sea Case* (n 26) 17, para. 6. The origin of the equidistance line can be traced to the principle of the mid-channel or thalweg which has its foundation in Roman law and is used where two states share a river and there is a need to determine the international boundary through the river. Donald R. Rothwell & Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010) 384.
[210] See e.g. Weil, *The Law of Maritime Delimitation* (n 158) 191-2.

added to this method, which is the comparison to the ratio of coastal lengths and the ratio of the relevant maritime areas allocated to each Party.[211] The third stage can be seen as a minor split from the considerations regarding relevant circumstances.

As will be explained below, equitable principles conquered equidistance before the ICJ in 1969 and became part of UNCLOS, termed 'equitable solution'. Equidistance is, however, the most commonly used method of continental shelf delimitations and is highly regarded by the ICJ. The Court stated in the *Gulf of Maine Case* that 'there is no single method which intrinsically brings greater justice or is of greater practical usefulness'.[212] It has also stated that '[t]he jurisprudence of the Court sets out the reasons why the equidistance method is widely used in the practice of maritime delimitation: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied'.[213]

2.4.4. The Development of Continental Shelf Delimitations

The first delimitation of the seabed beyond the territorial sea occurred in a treaty between the United Kingdom (Trinidad and Tobago) and Venezuela regarding the submarine areas of the Gulf of Paria in 1942.[214] Oil shortage and the strategic need for oil during the Second World War was the trigger for the treaty's conclusion. The treaty divides the areas explorable for hydrocarbons in the Gulf and in an adjacent channel.[215] It has been pointed out that '[t]he Paria Treaty could be considered as the logical outcome of two factors which, sooner or later, were bound to meet: the potential exploitation of offshore oil and the legal framework it required under international law'.[216] Since it was the first delimitation of its kind, it 'followed such delimitation methods that may be described as *sui generis* within a conventional delimitation'.[217] For instance, geological and geomorphological considerations as

[211] *Black Sea Case* (n 56) 103, para. 122.
[212] *Gulf of Maine Case* (n 172) 315, para. 162.
[213] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (Judgement) [2007] ICJ Rep. 659, 741, para. 272 (*Nicaragua/Honduras Case*).
[214] Treaty between His Majesty in Respect of the United Kingdom and the President of the United States of Venezuela Relating to the Submarine Areas of the Gulf Paria (adopted 26 February 1942; entered into force 22 September 1942) 205 *LNTS* 121 (1942 UK-Venezuela Treaty).
[215] Nweihed, 'Trinidad and Tobago-Venezuela (Gulf of Paria)' (n 24) 640.
[216] Ibid 641.
[217] Ibid 640.

well as considerations based on equidistance seem not to have played any role. The delimitation has not served as a precedent for any subsequent maritime delimitation.

It was the 1945 Truman Proclamation that introduced the criterion for modern continental shelf delimitations. The Proclamation provided that '[i]n cases where the continental shelf extends to the shores of another State, or is shared with an adjacent state, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles'.[218] The ICJ has noted that '[t]hese two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject'.[219] The principles of delimitation evolved during the 1950s. The ILC argued strongly for the equidistance method; its effort is seen in article 6(1)(2) of the 1958 Convention on the Continental Shelf which states that:

> In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Leonard Legault and Blair Hankey have described why the equidistance/special circumstances formula became so popular:

> The emergence of equidistance-special circumstances in the early treaty law may be explained by the fact that this formula struck a balance of some sort between predictability and flexibility, objectivity and discretion. Moreover, the combined rule generally respected the principle of equal division of the area of converging or overlapping claims, in the absence of inequities resulting from the aberrant coastal features or major differences in coastal lengths. Finally, it took account of adjacency or proximity to the coast as the legal basis of title for the territorial sea and as an integral part of the basis of title for the continental shelf. Later, with the appearance of the economic zone doctrine, this factor of adjacency was dubbed the 'distance principle' and assumed even greater theoretical importance for delimitation purposes as it became the single common element in the basis of title to all offshore zones within the 200-mile limit.[220]

In the *North Sea Case* of 1969, the ICJ rejected the idea that the equidistance/special circumstances method constituted a rule of customary law[221] concluding that there was 'no other single method of delimitation the use of which is in all circumstances obligatory'.[222] Moreover, the Court stated that '[i]nternational law of continental shelf delimitation does not involve any imperative rule and permits resort to various

[218] The Truman Proclamation (n 22).
[219] *North Sea Case* (n 26) 33, para. 47.
[220] Leonard Legault & Blair Hankey, 'Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation' in Jonathan Charney & Lewis Alexander (eds.) IMB 1 (n 22) 203, 204.
[221] *North Sea Case* (n 26) 45-6, paras. 81-2.
[222] Ibid 53, para. 101(B).

principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at'.[223] It confirmed, however, that delimitation is not a matter 'for the unfettered appreciation of the Parties'[224] and that it:

> is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party: all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.[225]

Later decisions and awards have iterated the status of the equidistance method as a non-principle. For instance, in the *Tunisia/Libya Case* the ICJ stated that 'equidistance is not ... a mandatory legal principle, or a method having some privileged status in relation to other methods'.[226] Moreover, the tribunal provided in the *Guinea/Guinea-Bissau Case* that 'the equidistance method is just one among many and there is no obligation to use it or give it priority'.[227] According to the Virginia Commentary, articles 74 and 83 give no prominence to any method of delimitation.[228]

Since the *North Sea Case* was decided international courts and tribunals have had to put the continental shelf puzzle together and create a predictable regime. Ironically, 'the Court's later jurisprudence on Article 6 has departed from its earlier conclusion and now assimilates it to the customary rule of delimitation based on equitable principles'.[229] In other words, the jurisprudence has moved in the direction of viewing the equidistance/special circumstances rule on the one hand, and delimitation according to equitable principles on the other, as incapable of being fully distinguishable. In consequence the margin for debate on what should be the primary method for delimitation has been tightened through decisions of international courts and tribunals in more recent cases.[230] ITLOS has noted that '[i]nternational courts and tribunals have developed a body of case law on maritime

[223] Ibid 49, para. 90.
[224] Ibid 46, para. 83.
[225] Ibid 53, para. 101(C)(1).
[226] *Tunisia/Libya Case* (n 40) 79, para. 110; See also *Libya/Malta Case* (n 58) 47, para. 63.
[227] *Guinea/Guinea-Bissau Case* (n 153) 294, para. 102.
[228] Nandan & Rosenne vol. II (n 106) 983.
[229] Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 204.
[230] See John Merrills, International Dispute Settlement (5th edn, Cambridge University Press 2011) 151.

delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end'.[231] The ICJ in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* noted

> [T]he equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the [EEZ], are closely interrelated.[232]

Similarly the Court stated in the *Land and Maritime Boundary Case between Cameroon and Nigeria* that:

> The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several ones of coincident jurisdiction is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'.[233]

The tribunal reached a similar conclusion in the *Barbados/Trinidad and Tobago Delimitation Case*:

> The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result …[234]

The ICJ's most recent case on maritime boundary delimitation case – the 2009 *Black Sea Case* – is 'built on the evolution of the jurisprudence on maritime delimitation'[235] and adds the notion of proportionality as the third stage of the delimitation method. It provided:

> Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line …[236]

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[231] *Bay of Bengal Case* (n 4) 72, para. 226.
[232] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Merits) [2001] ICJ Rep 40, 111, para. 231 (*Qatar/Bahrain Case*).
[233] *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgement) [2002] ICJ Rep. 303, 441, para. 288 (*Cameroon/Nigeria Case*).
[234] *Barbados/Trinidad & Tobago Case* (n 4) 839, para. 242.
[235] *Bay of Bengal Case* (n 4) 74, para. 233.
[236] *Black Sea Case* (n 56) 103, para. 122.

ITLOS, in the most recent judgement on maritime boundaries before any international court or tribunal, used the three stage approach. It described the method in the following manner:

> [T]he Tribunal will proceed in the following stages: at the first stage it will construct a provisional equidistance line, based on the geography of the Parties' coasts and mathematical calculations. Once the provisional equidistance line has been drawn, it will proceed to the second stage of the process, which consists of determining whether there are any relevant circumstances requiring adjustment of the provisional equidistance line; if so, it will make an adjustment that produces an equitable result. At the third and final stage in this process the Tribunal will check whether the line, as adjusted, results in any significant disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each Party.[237]

To summarise what has been stated above, the maritime delimitation method developed by that international courts and tribunals is of equitable principles/relevant circumstances. It is a three-stage method which is flexible enough to fit the geographical circumstances in most cases.

2.5. Concluding Remarks

Although the continental shelf concept has been developed by the usage of the whole arsenal of international law it is clear that international courts and tribunals, with the ICJ in the front seat, are the most important actors in this development. It was the ICJ that introduced the natural prolongation concept in the *North Sea Case*. It was the ICJ, in the same case, which rejected the equidistance/special circumstances method of the 1958 Continental Shelf Convention as a principle of customary international law and decided that delimitation must be in accordance with equitable principles. It was in the *Libya/Malta Case* that the ICJ gave scientific considerations, other than distance, the final blow in the establishment of the continental shelf within 200 nm. It was ITLOS that minimised the role of geology in the application and interpretation of article 76. Together, the ICJ and tribunals have created and developed maritime boundary delimitation jurisprudence. Even though UNCLOS is of high importance in continental shelf considerations, the central provisions of the Convention are mostly elaborative of the concepts created by courts and tribunals.

The natural prolongation concept, as understood in light of the subsequent provisions of article 76, is the most important concept for the establishment of the continental shelf beyond 200 nm with regard to both delineation and delimitation. It

[237] *Bay of Bengal Case* (n 4) 76, para. 240.

is the basis for entitlement to the continental shelf beyond the 200 nm limit. The foot of the slope concept can be said to be the second most important concept concerning the delineation of the continental shelf. It is the reference baseline for the methods established by UNCLOS to determine the exact location of coastal State's natural prolongation. The most important concept for the delimitation of the continental shelf is that of equitable principles. These principles focus on the unique and specific character of each case.

If a comparison is made between delineation and delimitation of the continental shelf beyond 200 nm, a few observations can be made. *First*, the act of delineation and delimitation consists of drawing a line that defines the jurisdiction of a coastal State. *Second*, both procedures have their roots in title. *Third*, the boundary line that is established by delineation is one between a coastal State and the Area, a *sui generis* international creature. The boundary line established by delimitation is, however, between two or more coastal States. *Fourth*, if a coastal State is going to delineate its continental shelf, it has to make a submission to the CLCS which must confirm the reasonableness of the submission, as will be discussed in the next chapter. If, however, a coastal State seeks to delimit the continental shelf beyond 200 nm, it must communicate directly with its neighbouring State(s).

3. The Role of the CLCS

3.1. Introduction

The CLCS is one of three institutions that were created with UNCLOS to implement its provisions. For the reason of 'the complexity [of article 76], because [it] involve[s] questions of sophisticated technical judgement, and because of the new interest of all states in the resulting boundaries, it was agreed to set up an administrative law type of procedure to help to settle particular boundaries'.[238] Wolfrum notes:

> Its establishment was a necessary element of bridging the gap between the aspirations of those States which considered the establishment of the outer limits of their continental shelves as part of their sovereignty and of those which wanted to limit a further seaward extension of national claims to the detriment of an internationally administered seabed area.[239]

As will be explained in the following chapter, the Commission is a specialist body with a limited mandate to consider data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nm and make recommendations based on this material in accordance with article 76 and Annex II of UNCLOS. In other words, it will be argued that 'the Commission is not a jurisdictional but a technological and scientific body, aimed at analysing the data supporting the coastal state's submission'.[240] It must be highlighted that an unusual string is attached to the recommendations of the Commission; they are final and binding if accepted by the submitting coastal State. There is thus something special about these recommendations. Another special aspect of the recommendations are that they 'will result in a major redrawing of the world map of the ocean floor, thereby changing the face of the world – even if that face lies beneath the waters of the seas and oceans around the globe'.[241]

The process that leads to the establishment of the outer continental shelf is quite different from the process of establishing the limits of the continental shelf in accordance with the 1958 Geneva Convention on the Continental Shelf, for no institutional elements were attached to the establishment of the continental shelf in

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[238] Allott (n 178) 18.
[239] Rüdiger Wolfrum, 'The Role of International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf' in Rainer Lagoni & Daniel Vignes (eds.) Maritime Delimitation (Koninklijke Brill N.V. 2006) 19, 21.
[240] Vicente Rangel, 'Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf: The Role of International Courts and Arbitral Tribunals' (2006) 21 IJMCL 347, 351.
[241] Subedi (n 142) 415.

that Convention. For the same reason, this process is also different from other processes that lead to the establishment of maritime zones under international law. Moreover, this process does not involve equitable solution considerations as in the process that leads to the establishment of maritime boundaries between neighbouring States. In short, the process is different from its predecessor process in the establishment of the extent of the continental shelf, is not the same as the process that leads to the establishment of the territorial sea, contiguous zone, or EEZ, and is different from the maritime boundary delimitation process.

This chapter seeks to define what is the role of the CLCS in the delineation and delimitation of the outer continental shelf. The focus will be on the legal nature of the Commission and its recommendations and how the Commission differs from international dispute settlement bodies. The chapter is divided into five parts. The first introduces the main legal instruments relevant to the Commission. The second asks what the CLCS in fact is. The third explains briefly how its recommendations are made. The fourth deals with four issues concerning the interpretation of article 76(8) of UNCLOS. Finally, the question is considered as to how the CLCS should deal with a submission in the case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes.

3.2. Legal Instruments

The Commission is established by article 76(8) of UNCLOS, which defines its principal role. Annex II deals with the composition and function of the Commission, how it organises its work, the obligations of coastal States when making submissions, and the applicable procedure in the event of a disagreement between the Commission and a submitting coastal State. It includes a provision, similar to article 76(10), that '[t]he actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts'.[242]

Also of importance are soft law instruments established by the Commission itself. The CLCS has created two such instruments; namely the Rules of Procedure of the Commission on the Limits of the Continental Shelf[243] and the Scientific and

[242] Article 9 of Annex II to UNCLOS.

[243] The current version of the Rules of Procedure of the Commission on the Limits of the Continental Shelf (the Rules of Procedure) was adopted by the CLCS, Doc. CLCS/40/Rev.1. (11 April 2008). It contains amendments and additions to the earlier version thereof. Annexes I and II to the present

Technical Guidelines of the Commission. The Rules of Procedure are more detailed than is Annex II to UNCLOS. They include three annexes. The first addresses submissions in the event of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes. It has been questioned whether some of its provisions are in conformity with UNCLOS, as will be discussed later in this chapter. The second annex establishes the rules of confidentiality concerning information and data submitted to the Commission. The third annex contains the modus operandi for the consideration by the Commission of a submission made thereto.

Although there is nothing in UNCLOS that allows the Commission explicitly to establish procedural rules or scientific and technical guidelines, the creation of such instruments can possibly be justified on the basis that international institutions have the power to adopt rules for their internal functions.[244] This is sometimes referred to as the 'doctrine of implied powers' established in the Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*.[245] According to that doctrine, an organisation must, under international law, 'be deemed to have those powers which, though not expressly provided in the [UN] Charter,[246] are conferred upon it by necessary implication as being essential to the performance of its duties'.[247] The ILA Committee has pointed out that '[t]he Commission is competent to establish the rules applicable to its own internal procedures' with which States must comply in their dealings with the CLCS.[248] These 'rules can only be objected against on the ground that the CLCS has overstepped the limits of its

Rules were adopted by the CLCS at its fourth session in 1998. Annex III was adopted by the CLCS at its thirteenth session, in 2004, and replaced the modus operandi of the Commission (Doc. CLCS/L.3 of 12 September 1997) and the internal procedure of its subcommissions (Doc. CLCS/L.12 of 25 May 2001).

[244] See Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions* (6th edn, Sweet and Maxwell 2009) 455-6. Questions regarding the legal personality of CLCS are discussed later in this chapter.

[245] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep. 174, 182 (*Reparation Case*).

[246] Charter of the United Nations (adopted 26 June 1945; entered into force 24 October 1945) 1 UNTS xvi (UN Charter).

[247] Ibid. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep. 66, 78-9, para. 25.

[248] 2004 ILA Report (n 71) 781.

competence or that these rules are invalid for other reasons'.[249] The UN under-secretary for legal affairs has noted that it should be underlined:

> [T]hat rules of procedure and other relevant documents adopted by the Commission should be in strict conformity with the pertinent provisions of the Convention … In the case of any conflict between the provisions of these documents, which are supplementary by their nature, and those of the Convention, the latter shall prevail.[250]

A complicating factor in the work of the Commission is that at the time of the negotiation of UNCLOS 'the knowledge and information available on the seabed and ocean floor had been much less developed than today'.[251] Consequently, the drafters of the Convention had not anticipated the technical complexities involved in the application of some of its provisions, in particular those of Part VI and Annex II to the Convention.[252] To ameliorate some of the problems caused by the ambiguities of article 76 of UNCLOS, the CLCS adopted the Scientific and Technical Guidelines with the aim of assisting coastal states in fulfilling their obligation to submit data and other information to the Commission to be able to establish the outer limits of the continental shelf. The importance of the Guidelines is explained in the first chapter thereof:

> With these Guidelines, the Commission aims ... to clarify its interpretation of scientific, technical and legal terms contained in the Convention. Clarification is required in particular because the Convention makes use of scientific terms in a legal context which at times departs significantly from accepted scientific definitions and terminology. In other cases, clarification is required because various terms in the Convention might be left open to several possible and equally acceptable interpretations. It is also possible that it may not have been felt necessary at the time of the Third United Nations Conference on the Law of the Sea to determine the precise definition of various scientific and technical terms. In still other cases, the need for clarification arises as a result of the complexity of several provisions and the potential scientific and technical difficulties which might be encouraged by States in making a single and unequivocal interpretation of each of them.[253]

It has been argued that the Guidelines 'come close to being an authoritative interpretation of the technical provisions found in Article 76'.[254] Some go even

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[249] Ibid.

[250] *Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf*, Doc. CLCS/46 (7 September 2005) 8 (2005 UN Legal Counsel Letter). The legal opinions of the Legal Counsel are not binding on States. They do, however, usually respect such opinions.

[251] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Seventeenth Session, Doc. CLCS/50 (10 May 2006), 2 para. 7;

[252] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, nineteenth session, Doc. CLCS/54 (27 April 2007), 3, para. 8.

[253] The Scientific and Technical Guidelines (n 84) 7 para. 1.3.

[254] L.D.M. Nelson, 'The Continental Shelf: Interplay of Law and Science' in Nisuke Ando, Edward McWhinney, Rüdiger Wolfrum (eds.) *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International

further and state that the Guidelines are 'the first authoritative and detailed scientific and technical interpretation of article 76'.[255] These views seem to be in line with the judgement in the *Bay of Bengal Case* which made references to the Guidelines when addressing the meaning of natural prolongation.[256]

3.3. What is the CLCS?

3.3.1. What is the Role of the CLCS?

The CLCS has been given a specific function under article 76(8) of UNCLOS and article 3(1) of Annex II to the Convention. Article 76(8) of UNCLOS provides:

> Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

Article 3(1) of Annex II to UNCLOS provides that the functions of the Commission shall be:

> a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;
> b) to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).

The provisions above provide that the role of the CLCS is twofold; (1) to consider submissions[257] from coastal States and subsequently to issue recommendations;[258] and (2) to provide scientific and technical advice.[259] The former role is the primary one. It consists of an evaluative process which is scientific and technical in nature. It

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2002) 1235, 1242.

[255] Peter Croker, 'The Commission on the Limits of the Continental Shelf: Progress to Date and Future Challenges' in Myron Nordquist, John Moore & Tomas Heidar (eds.) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 215, 216.

[256] *Bay of Bengal Case* (n 4) 127-8, para. 436.

[257] The Scientific and Technical Guidelines provide in detail how to structure a submission. See paras. 9.1.3-6 of the Scientific and Technical Guidelines (n 84) 71-2.

[258] The CLCS also has the task of considering resubmissions. See article 8 of Annex II to UNCLOS.

[259] Another role of the CLCS worth mentioning is the training and educational role played by members of the Commission in their personal capacities. See e.g. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Fourteenth Session, Doc. CLCS/42 (14 September 2004), 6 para. 29. The Commission has emphasised that a clear distinction has 'to be maintained between training on the one hand and advice to a coastal State'. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Fifth Session, Doc. CLCS/12 (18 May 1999) 4, para. 18.

constitutes an independent assessment of the data submitted by the coastal State. This role 'implies a power to establish whether the scientific and technical data submitted by a coastal State prove that the conditions which allow the specific delineation of the outer limit of the continental shelf are met'.[260] In this process the CLCS must answer the question of 'whether ... the scientific and technical data submitted by the coastal State actually supports the conclusions which are drawn from them ... and ... [whether] these conclusions are in accordance with article 76'.[261] The CLCS has indicated that it prefers bathymetrical, geodetical, geophysical (seismic, gravity and magnetic data) and geological evidence, both digital and non-digital, including maps and charts.[262] This preference of the CLCS is not, however, binding upon States. UNCLOS does not prohibit States from using any kind of evidence.

In this context it must be noted that a coastal State can submit 'in the course of the examination by the Commission of its original information, new particulars of the limits of its continental shelf or substantial part thereof if in the view of the coastal State concerned it is justified by additional scientific and technical data obtained by it'.[263] This is something which States have done in practice.[264] The purpose of submitting 'such additional material and information is to support, integrate and clarify the particulars of the limits of the continental shelf contained in the submission'.[265] This is an important aspect of the dialogue that takes place between the coastal State and the CLCS in the delineation procedure.

[260] 2004 ILA Report (n 71) 779.
[261] Ibid fn. 27.
[262] See the Scientific and Technical Guidelines (n 84) 71-8.
[263] 2005 UN Legal Counsel Letter (n 250) 6; See also *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Fifteenth Session, Doc. CLCS/44 (3 May 2005) 3 para. 13. This issue arose when the CLCS was considering the Brazilian submission.
[264] See e.g. Barbados Recommendations (n 109) 3, para. 16; Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission made by Mexico in respect of the Western Polygon in the Gulf of Mexico on 13 December 2007 (31 March 2009) 2, para. 15 (Mexico Recommendations); Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Joint Submission made by Mauritius and the Seychelles Concerning the Mascarene Plateau Region on 1 December 2008 (30 March 2011) 1, para. 3 & 2 para. 11.
[265] Maria Infante, 'The Outer Continental Shelf and South American Coastal States' in Davor Vidas (ed.) *Law, Technology and Science for Oceans in Globalisation – IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff 2010) 577, 580.

Although article 3(1)(a) of UNCLOS clearly 'provides a link between CLCS work and legal standards',[266] it is important to note that the above provisions, or other provisions in UNCLOS, do not 'charge the Commission to consider and make recommendations on legal matters'.[267] Nevertheless, 'the consideration of a submission by the CLCS in general will not only be concerned with the evaluation of scientific and technical data, but may also require findings on the interpretation or application of the legal terms contained in article 76 and other provisions of the Convention':[268]

> Although the functions of the CLCS are concerned with the assessment of scientific and technical data, this assessment has to be carried out 'in accordance with article 76 of the Convention'. This wording indicates that the CLCS is bound to apply the substantive provisions of article 76 in considering the information that has been submitted by the coastal State. This requirement would raise few problems if the provisions of article 76 would not raise any questions concerning their interpretation or application. However, this clearly is not the case. The interpretation and practical application of various provisions of article 76 are controversial. While one interpretation of a provision of article 76 may lead to the conclusion that specific data proves that the requirements of the article are met, under another interpretation the same data might not provide sufficient proof in this respect.[269]

Even although the CLCS has not been given the competence to render an award binding on the parties concerned, 'the Commission has to be presumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention to the extent this is required to carry out the functions which are explicitly assigned to it'.[270] The ILA Committee notes:

> This conclusion also follows from the fact that the Commission is charged with considering submissions in accordance with article 76 of the Convention. This function includes the question whether the information that has been submitted to the Commission proves that the conditions set out in article 76 are actually met by the coastal State for the specific outer limit lines it proposes. At times, this may require the interpretation of specific provisions of article 76. The Commission will have to make its own assessment of whether the interpretation a coastal State has (implicitly) adopted in its submission actually is in accordance with article 76. At the same time, the requirement to consider submissions and make recommendations *in accordance with* article 76 indicates a limit on the scope for independent action by the Commission.[271]

Although the CLCS must to some extent have the power to interpret article 76 and Annex II of UNCLOS, 'since it cannot fulfil its role in clinical isolation from legal

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[266] John Noyes, 'Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf' (2009) 42 Vand. J. Transnat'l Law 1211, 1232.
[267] 2004 ILA Report (n 71) 778.
[268] Ibid 775.
[269] Ibid 776-7.
[270] Ibid 778.
[271] Ibid 778-9.

considerations',[272] it must be noted that 'the competence to interpret and apply article 76 of the Convention rests in the first place with its States parties'.[273] The CLCS 'is only competent to deal with the interpretation of the provisions of article 76 and other provisions of the Convention to the extent this is necessary to carry out the functions which have been assigned to it under the Convention'.[274] As a consequence, the ILA Committee argues that 'this competence has to be interpreted restrictively' and 'does not replace the competence of the States parties (or courts or tribunals) to interpret the Convention'.[275] Wolfrum notes that the role of the CLCS in this context is rather to direct the State to delineate the outer continental shelf in conformity with article 76 without infringing upon the sovereignty of the State.[276] The ILA Committee argues:

> It should be noted that the assessment of scientific and technical data, which is one of the functions of the CLCS, has to be distinguished from the consideration of scientific and technical terms in connection with the interpretation of provisions of article 76 of the Convention. A number of terms included in the Convention have been derived from the field of natural sciences. This fact does, however, not place their interpretation beyond the legal realm and does not give the CLCS a competence to interpret these provisions which is different from the competence which it has generally in this respect ... These limitations on the competence of the Commission indicate that the Commission should defer to a reasonable interpretation of article 76 provided by a coastal State making a submission. This state of affairs might possibly lead to the existence of contradictory interpretations of article 76. This makes it important to consider how other States parties to the Convention can indicate their views on these provisions and how possible disputes between the submitting State and other States can be resolved.[277]

It must be asked what is meant by the ILA Committee stating that 'the Commission should defer to a reasonable interpretation of article 76 provided by a coastal State making a submission'. If one considers that a fundamental role of the CLCS is to guard the Area against excessive claims by coastal States, then why should the CLCS defer to a coastal state at all? The CLCS must, given its role, have some powers of interpretation.

It can be argued that the CLCS has interpreted UNCLOS incorrectly and that it has established rules not found in UNCLOS. As mentioned in chapter two, when

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[272] Bjørn Kunoy, 'The Terms of Reference of the Commission on the Limits of the Continental Shelf: A Creeping Legal Mandate' (2012) 25 LJIL 109, 130.
[273] 2004 ILA Report (n 71) 779; See also Ted McDorman, 'The Outer Continental Shelf in the Arctic Ocean: Legal Framework and Recent Developments' in Davor Vidas (ed.) *Law, Technology and Science for Oceans in Globalisation – IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff 2010) 499, 508.
[274] 2004 ILA Report (n 71) 779-80; See also Noyes (n 266) 1232.
[275] 2004 ILA Report (n 71) 780.
[276] Wolfrum (n 239) 23.
[277] 2004 ILA Report (n 71) 780.

the CLCS considered Norway's submission regarding the Arctic Ocean and the Barents Sea, the Commission adopted the position that the 2500-metre isobath constraint line had to be landward of the foot of the continental slope even although nothing in UNCLOS supports this interpretation. The CLCS has adopted other controversial positions, some of which are discussed later in this chapter.

As mentioned, the Commission plays an important role with regard to the fundamental aim of article 76 of UNCLOS to guarantee that the Area, which UNCLOS recognises as the common heritage of mankind,[278] is not improperly diminished by excessive unilateral delineations by coastal States.[279] Interestingly, the Authority plays no part in the delineation process although it has a significant interest in the revenue sharing system established by article 82.[280] It has been noted that in the delineation process 'the Authority merely serves as a depositary of information submitted by coastal States giving the outer limit lines of the continental shelf'.[281] One of the main purposes for the creation of the CLCS was to safeguard the outer limits of the Area. This has been explained in the following way:

> Having reached agreement on the outer limit, coupled with revenue sharing, it was next realized that some mechanism was necessary to verify that the limit established by any particular coastal state was in accord with the rules set forth in Article 76. If this mechanism was not institutionalized in the treaty, then the potential for conflict between an individual coastal state and the Authority would be great, with resulting uncertainties and delays. It was also understood that this mechanism could not be institutionalized within the Seabed Authority itself, since the Authority was an interested party. Obviously, an independent body was the answer, one that had no ties either to the coastal state or to the Authority.[282]

Franckx has, importantly, noted that:

> Coastal states will ... need to determine the outer edge of the continental margin extending beyond 200 nm first, in accordance with Article 76 of the 1982 Convention, before mankind as a whole

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[278] Article 136 of UNCLOS.

[279] China has expressed the view that whilst State parties to UNCLOS exercise the right to submit information on the outer limits of the outer continental shelf they 'shall also have the obligation to ensure respect for the extent of the International Seabed Area ... and not to affect the overall interests of the international community as a whole'. *Note Verbale of the Permanent Mission of the People's Republic of China to the United Nations* (6 February 2009) Doc. CML/2/2009 (China's reactions to Japan). The note was a reaction to the submission made by Japan to the CLCS.

[280] Satya Nandan & Shabtai Rosenne (eds.) *United Nations Convention on the Law of the Sea; A Commentary* vol. VI (Martinus Nijhoff 2002) 85.

[281] Ibid. Article 134(3) of UNCLOS provides that '[t]he requirements concerning deposit of, and publicity to be given to, the charts or lists of geographical coordinates showing the limits referred to in article 1, paragraph 1(1), are set forth in Part VI'.

[282] Thomas Clingan, 'Dispute Settlement among Non-Parties to the LOS Convention with Respect to the Outer Limits of the Continental Shelf' in Thomas Clingan (ed.) *The law of the sea – what lies ahead?* (The Law of the Sea Institute William S. Richardson School of Law University of Hawaii 1988) 495, 496.

> will be able to know with any certainty what the spatial limits are within which the principle of the common heritage of mankind applies.[283]

The CLCS received its first submission in December 2001 from the Russian Federation. In mid-July 2012, the CLCS had received 61 submissions and 45 preliminary information submissions and had issued 18 recommendations. In the final 12 months before the 2009 deadline, the Commission received 40 submissions. There exists no definite number of submissions that the Commission will receive. Nevertheless, the Chairman of the CLCS has stated that 'expected total number of submissions was as high as 65 almost double the number of submissions forecast at the time of the drafting of the Convention'.[284] It is likely that this estimation is too cautious. The area claimed in the first 51 submissions is over 23 million square kilometres in size.[285] Thereof is 10% included in two or more submissions; that is to say 10% of the claimed area is subject to overlapping claims.[286] In a much quoted inventory from 1998, Prescott identifies 29 areas of continental shelf extending beyond 200 nm (absent Antarctica). Of these, 22 involve more than one State and only seven involve just one State.[287] This clearly indicates that the delineation and delimitation processes are interlinked and the extent to which the CLCS will be faced with delimitation issues.

As aforementioned, the role of the CLCS is not only to consider submissions and issue recommendations. It also has the role of providing 'scientific and technical advice, if requested by the coastal State concerned during the preparation of the data' that is necessary for concluding a submission.[288] The advice can be quite important for developing States, especially those that do not have broad access to experts.[289]

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[283] Franckx (n 8) 554; See also Michael Gau, 'The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon the Area' (2011) 10 Chinese JIL 3ff.

[284] *Report of the seventeenth Meeting of States Parties*, Doc. SPLOS/164 (16 July 2007) 12, para. 56.

[285] Continental Shelf: The Last Maritime Zone (Tina Schoolmeester & Elaine Baker eds., (UNEP/Grid-Arendal 2009) 28 <http://www.unep.org/dewa/pdf/AoA/Continental_Shelf.pdf> accessed 16 July 2012.

[286] Ibid.

[287] Victor Prescott,'National Rights to Hydrocarbon Resources of the Continental Margin Beyond 200 Nautical Miles' in G.H. Blake, M.A. Pratt & C.H. Schofield (eds.) *Boundaries and Energy: Problems and Prospects* (Kluwer Law International 1998) 51, 56-8.

[288] Article 3(1)(b) to Annex II of UNCLOS. This role is further elaborated in rule 55 of the Rules of Procedure.

[289] It must however be noted that the coastal State in question is responsible for the expenses incurred in respect of the advice. See article 2(5) of Annex II to UNCLOS. UNGA has created a trust fund which should to some extent be beneficial for developing States. See *Trust fund for the purpose of facilitating the preparation of submission to the Commission on the Limits of the Continental Shelf for*

3.3.2. Who are the Members of the CLCS?

The CLCS consists of 21 members who are experts in the fields of geology, geophysics or hydrography.[290] It has been criticised that law is not one of the fields of expertise qualifying candidates for election to the CLCS, given the central role of the Commission in the application of the provisions of UNCLOS. Nelson has argued that even although the CLCS is not a court, 'one of the cardinal functions of the Commission must necessarily be to interpret or apply the relevant provisions of UNCLOS; an essentially legal task'.[291] In defence of the composition of the Commission, it must be noted that it may, to the extent considered necessary and useful, consult specialists in any field relevant to its work.[292] Specialists in international law can therefore be called upon to give advice at the request of the Commission. Of greater importance, the secretariat of the Commission is in the Division for Ocean Affairs and Law of the Sea of the United Nations Secretariat. Moreover, the Commission can seek advice from the Legal Counsel of the United Nations. It can also request the Meeting of States Parties to UNCLOS to clarify or make recommendations on specific issues,[293] as, indeed, it has done. The ILA Committee notes in this context that '[i]n the case of controversial issues, it may be difficult for the Meeting of States parties to assist the Commission in this respect'.[294]

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developing States, in particular the least developed countries and small island developing States, and compliance with article 76 of the United Nations Convention on the Law of the Sea. Established with UNGA Doc. A/Res/55/7 Annex II (2001) and amended with UNGA A/Res/58/240 Annex I (2003).

[290] Article 2(1) of Annex II to UNCLOS.

[291] Nelson, 'The Continental Shelf' (n 254) 1238; See also Edward Brown, *Sea-bed Energy and Minerals: The International Legal Regime - Vol. 1* (Martinus Nijhoff 1992) 31. In another article, Nelson states that the non-participation of lawyers in the CLCS is 'a seemingly intentional omission.' L.D.M. Nelson, 'Claims to the Continental Shelf Beyond 200-mile limit' in Volkmar Götz, Peter Selmer and Rüdiger Wolfrum (eds.) *Liber Amicorum Günther Jaenicke – Zum 85. Geburtstag* (Springer 1998) 573, 578.

[292] See article 3(2) of Annex II to UNCLOS and rule 57(1) of the Rules of Procedure.

[293] Article 319(2)(e) of UNCLOS provides that the Secretary-General shall ... 'convene necessary meetings of States Parties in accordance with' UNCLOS. These meetings are not held occasionally, as the paragraph indicates. They have become an important annual event to oversee developments in the law of the sea. The option of seeking advice from the Meeting of States Parties has not been welcomed by everyone. Eiriksson does not 'consider it wise for the Commission to treat the Meeting of States Parties as a consultative body from the legal point of view ... Admittedly, a certain *Realpolitik* may set in.' Gudmundur Eiriksson, 'The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf' in Myron Nordquist, John Moore & Tomas Heidar (eds.) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 251, 255. On the other hand, it must be pointed out that the decisions of the Meeting represent the will of the State Parties to UNCLOS. From this viewpoint it must be regarded as prudent for the Commission, consisting of experts in science and technology, to seek the legitimation of its acts through the approval of the Meeting of the States Parties.

[294] 2004 ILA Report (n 71) 778.

The fact that the 'CLCS only rarely seeks legal advice, and when it does so is reliant on a sole provider, the United Nations Secretariat's Office of Legal Affairs',[295] seriously damages this argument of defence. Oude Elferink has argued, from a different perspective:

> [T]his 'perceived weakness' of the CLCS, in the sense that it is a body that does not include legal expertise, may rather be considered its strength. This 'weakness' makes it possible to insulate the CLCS to a large extent from (the resolution of) legal disputes and have it focus on the tasks which have been entrusted to it under the Convention, which primarily involve the evaluation of scientific and technical data.[296]

Rothwell has pointed out that '[i]t is clear that the Commission is not to be comprised of jurists or legal experts, which further reinforces the scientific nature of its work'.[297] Similarly, Oxman notes that 'the Commission is not a court, and legal expertise is not included among the express qualifications of its members'.[298] Zinchenko provided:

> The Commission is not a court of law, nor was it ever expected to become one. It was neither conceived as a watchdog, nor as a chamber for the easy and convenient approval of coastal States' submissions. The role of this highly scientific organ, which is called upon to provide assistance in the very politicized realm of setting legal boundaries, is to help establish the true limit of the outer boundary of the continental shelf according to the terms of the United Nations Convention on the Law of the Sea.[299]

On this issue the ILA Committee stated:

> The question how the absence of legal expertise in the Commission has to be judged depends on: a) its functions under the Convention ... are in the first place concerned with the consideration of scientific and technical data; and b) to what extent the procedure involving the Commission might exclude the application of Part XV of the Convention to questions concerning the interpretation or application of article 76. If article 76 were to be completely excluded from the procedures of Part XV, the absence of legal expertise in the Commission would seem to be problematic, as there then would be hardly any possibility to submit questions of interpretation raised by a submission to legal scrutiny.[300]

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[295] Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 356.

[296] Alex Oude Elferink, 'The Continental Shelf Beyond 200 Nautical Miles: The Relationship Between the CLCS and Third Party Dispute Settlement' in Alex Oude Elferink & Donald Rothwell (eds.) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff 2004) 107, 123.

[297] Donald Rothwell, 'Issues and Strategies for Outer Continental Shelf Claims' (2008) 23 IJMCL 185, 189.

[298] Bernard Oxman, 'Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)' (1981) 75 AJIL 211, 230-1.

[299] Alexei Zinchenko, 'Emerging Issues in the Work of the Commission on the Limits of the Continental Shelf', in Myron Nordquist, John Moore & Tomas Heidar (eds.) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 223, 225.

[300] 2004 ILA Report (n 71) 777. The latter issue (issue b) is dealt with in chapter four.

The initial election of members to the Commission was supposed to be held within 18 months from the date of the entry into force of UNCLOS, at the latest.[301] Although the time limit is clearly expressed in UNCLOS, the Commission did not meet until 16 June 1997, 13 months later than it was supposed to. In the third Meeting of States Parties to UNCLOS it was agreed to postpone the election of members until March 1997.[302] The main reason for the delay was the wish to reach universal participation in the Convention prior to the Commission elections.[303] The delay of the elections permitted 31 other countries to become parties to the Convention prior to the first election of members to the Commission.[304]

The election of members to the Commission shall be held at a meeting of States parties. A nominee requires two-thirds majority of the votes from the representatives present and voting[305] where two-thirds of the State parties constitutes a quorum.[306] Members are elected for a term of five years and are eligible for re-election.[307] The CLCS members are elected by State parties to UNCLOS from among their own nationals,[308] with due regard to the need to ensure equitable geographical representation.[309] At least three members shall be elected from each geographical region.[310] The rationale underlying the requirement of equitable geographical representation in the Commission can be traced to the fear of industrialised coastal States that they could easily be outvoted by a majority of

[301] Article 2(2) of Annex II of UNCLOS.
[302] *Report of the third Meeting of States Parties*, Doc. SPLOS/5 (22 February 1996) 7, para. 20.
[303] Bjørn Kunoy, 'The 10 Year Time Frame to Disputed Areas', (2009) 40 ODIL 131, 132.
[304] Ibid 142, fn. 14.
[305] In United Nations practice, the expression 'present and voting' excludes in this context States which abstain from voting or do not participate in the vote. See e.g. Nandan & Rosenne vol. II (n 106) 1015.
[306] Article 2(3) of Annex II of UNCLOS.
[307] Ibid article 2(4).
[308] This means that citizens from non-parties to UNCLOS, such as the USA, cannot be elected. In practice, individual member nominations tend to originate from each nominee's home State.
[309] In a footnote to rule 30 of the newest version of the Rules of Procedure of the General Assembly, UN Doc. A/520/Rev.17 (September 2007) (UNGA Rules of Procedure), the five geographical groups established are: Asia, Africa, Eastern-Europe, Western Europe and others, and Latin American and the Caribbean.
[310] Article 2(3) of Annex II to UNCLOS. The nineteenth meeting of States Parties decided that the Group of African and Asian States should be allocated five seats at the Commission's table from the next election. This decision was based on the large numbers of States parties from these continents. See *Arrangement for the allocation of seats on the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf*, Nineteenth Meeting, Doc. SPLOS/201 (26 June 2009) 1-2; *Report of the nineteenth Meeting of States Parties*, Doc. SPLOS/203 (24 July 2009) 17-8, paras. 96-102.

developing States.[311] The ILA Committee notes that '[s]ome concern has been voiced in respect of the consistency and predictability of the work of the CLCS'.[312] The reason for this concern stems 'among others from the fact that the procedure for election of the members of the CLCS can result in a significant turnover in membership and that there will be limited information on the reasoning of the CLCS in dealing with submissions'.[313]

It is important to note that members of the CLCS serve in their personal capacities. The Commission does not consist of States, representatives of States or representatives of the United Nations. The members are intended to be elected due to their relevant expertise in specific fields of science and technology and must be politically and commercially neutral in the execution of their work for the CLCS. Members must not only be neutral in terms of politics and commerce, but must also 'strive for scientific objectivity in areas where there may be wide and legitimate divergences of opinion: as an arbiter between schools of competing scientific thought concerning the seabed and its underlying structures' and be aware 'that decisions taken on the basis of its recommendations are "final and binding", with no provision for future revisions to reflect improved information and understanding'.[314]

The manner in which members' expenses are defrayed has caused some turbulence. Annex II to UNCLOS provides that '[t]he State Party which submitted the nomination of a member of the Commission shall defray the expenses of that member while in performance of Commission duties'.[315] Subedi has noted that '[t]his can be an impediment to the independence of the Commissioners and may make them more accountable to the nominating State than to the [Meeting of States Parties]'.[316] On the other hand it has been pointed out that '[t]he election process itself is only marginally more open to criticism than the process, found elsewhere, of State sponsorship of candidatures, even to international adjudication bodies' such as

[311] Clingan, 'Dispute Settlement among Non-Parties to the LOS Convention with Respect to the Outer Limits of the Continental Shelf' (n 282) 497.
[312] 2002 ILA Report (n 68) 748.
[313] Ibid.
[314] Ron Macnab, 'The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76' (2004) 35 ODIL 1, 11.
[315] Article 2(5) of Annex II to UNCLOS.
[316] Subedi (n 142) 428.

the ICJ, ITLOS and the International Criminal Court.[317] It would perhaps be rather more in the spirit of impartiality if 'the expenses of each Commission member should be borne by the United Nations to make it a real independent Commission', as a former member of the Commission has suggested.[318]

3.3.3. What kind of Entity is the CLCS?

As mentioned above, it can be difficult to define what kind of entity is the CLCS. The Commission has been categorised in various ways and from various perspectives. The UN Legal Counsel, in his legal opinion regarding the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission, stated that 'the Commission is neither a principal nor a subsidiary organ of the United Nations, but might be considered as a "treaty organ" of the Organization'.[319] Treaty organs have been defined as a 'category of global organisations, which includes bodies created within the framework of a treaty intended to establish substantive rules regulating conduct within a specialised area, but that are not (fully) part of the United Nations system'.[320] Many of these organs 'have international legal personality and varying capacities and powers at international and national levels, rules of procedure and membership and enumerated powers relating to decision-making and adjudication and, occasionally, enforcement powers'.[321]

In this context the question must be asked whether the CLCS has independent legal personality. A few facts must be taken into account when this issue is observed. The secretariat of CLCS is provided for by the Secretary-General. The members of the Commission are elected by the Meeting of States Parties. The fact that the UN Legal Counsel suggested that the CLCS is a treaty organ of the UN seems to suggest

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[317] Eiriksson, 'The Case of Disagreement between a Coastal State and the CLCS' (n 293) 254.
[318] Noel Francis, 'The Continental Shelf Commission' in Myron Norquist & John Moore (eds.) *Oceans Policy: New Institutions, Challenges and Opportunities* (Martinus Nijhoff 1999) 141, 144. The Commission has proposed that members of CLCS should 'receive emoluments and reimbursement of expenses while they are performing Commission duties … through the regular budget of the United Nations' with the aim of ensuring a more functional Commission. See *Letter dated 19 May 2006 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the President of the sixteenth Meeting of States Parties*, Sixteenth Meeting, Doc. SPLOS/140 (Annex) (19 May 2006) 9, para. 7; SPLOS/203 (n 310) 15, para. 85.
[319] *Letter dated 11 March 1998 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Commission on the Limits of the Continental Shelf*, Doc. CLCS/5 (11 March 1998) 1, para. 2.
[320] Sands & Klein (n 244) 115.
[321] Ibid.

that it does not have its own legal personality. It must also be noted that the way in which the CLCS has chosen to operate, that is largely through requests through other bodies rather than act independently, as will be discussed below, seems also to indicate that it does not have independent legal personality. Moreover, UNCLOS only provides the Commission with the power to enter into cooperation arrangements with the Intergovernmental Oceanographic Commission[322] and the International Hydrographic Organisation[323] and other competent international organisations, and it cannot bring and receive claims, as will be discussed in next chapter. This seems to indicate that the CLCS does not have independent legal personality.[324]

It is clear that the CLCS cannot be categorised as an international organisation in the meaning of article 305(1)(f) of UNCLOS since it is not 'an intergovernmental organization constituted by States which its member States have transferred competence over matters governed by' UNCLOS.[325] It is also clear that the Commission is not a court or tribunal and its role is not to resolve disputes. There are at least three factors supporting this view. The *first* factor, as aforesaid, is that the members of the CLCS are not required to be specialists in law, as are judges of international courts and tribunals.[326] The *second* factor is that the outcome of the CLCS procedure is a recommendation not a judgement or award. A recommendation of the CLCS is only binding if a submitting coastal State establishes the limits of the outer continental shelf on the basis of the recommendation. A decision of the ICJ is, by contrast, binding between the parties[327] and its judgement is final and without a right to appeal.[328] Moreover, there is no enforcement mechanism behind recommendations, such as can be found in the case of ICJ judgements.[329] The *third*

[322] Hereinafter IOC.
[323] Hereinafter IHO.
[324] See Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions* (5th edn, Sweet and Maxwell 2001) 137.
[325] Article 1 of Annex IX to UNCLOS.
[326] See e.g. article 2 of the Statute of the International Court of Justice, (adopted 26 June 1945; entered into force 24 October 1945) 1 UNTS xvi (ICJ Statute); article 2(1) of Annex VI to UNCLOS; article 36(3)(a) of the Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force 1 July 2002) 2187 UNTS 90.
[327] Article 59 of the ICJ Statute.
[328] Ibid article 60.
[329] Article 94(2) of the UN Charter provides: 'If any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement.' See also Subedi (n 142) 424.

factor is that the expenses of CLCS members, whilst in the performance of their duties, are to be paid by the State party which nominated the member that was elected, not the UN.

McDorman has convincingly argued that the CLCS is what he calls a legitimator. He clarifies this concept as follows:

> Legitimation is not the same thing as legal or political approval. Moreover, legitimation must be understood not in terms of black-and-white (legitimate or illegitimate) but as a spectrum between greater legitimacy and lesser legitimacy.[330] The calculation by a state whether the establishment of a continental margin outer limit by another state is legitimate and whether a protest will or will not be issued by a non-claiming state involves law and politics. The state parties to the LOS Convention have not surrendered or delegated this calculation to the Commission.[331]

Moreover, McDorman suggests that 'the only concrete role of the Commission in the delineation of the outer limits is *procedural*'.[332] He points out that '[t]he Commission's task as legitimator and guardian must take priority over the natural tendency of technical professionals to seek precision and apply rigorous scientific standards of proof'.[333] Similarly, Noyes notes that '[t]he CLCS does not set or certify outer limits; it fills a procedural role, issuing recommendations that can help legitimate the outer limits that coastal states establish'.[334] Subedi reaches the conclusion that the status of the CLCS 'seems to fall somewhere between a quasi judicial and an administrative body' and perhaps could 'best be described as a technical-*cum*-scientific body consisting of members with technical and scientific expertise'.[335]

Some might attempt to compare the CLCS to mixed boundary commissions, namely commissions responsible for the technical aspects of land-boundary making or frontier delineation. A mixed boundary commission is an entity which 'may be designated to carry out any boundary-making function which requires some degree of expert and technical knowledge'.[336] A striking similarity between the CLCS and mixed boundary commissions is not only their technical mandate and purpose but

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[330] Legitimacy can be defined as 'the normative belief that a rule or institution ought to be obeyed'. Boyle & Chinkin (n 229) 24.
[331] Ted McDorman, 'A Note on the Commission on the Limits of the Continental Shelf and the Submission of the Russian Federation' in David Caron & Harry Scheiber (eds.) *Bringing New Law to Ocean Waters* (Martinus Nijhoff 2004) 467, 472.
[332] Ibid.
[333] Ibid 473.
[334] Noyes (n 266) 1232.
[335] Subedi (n 142) 430.
[336] Cukwurah (n 9) 80.

also that 'international practice, as a rule, regards the findings of Mixed Commissions as subject to approval by the adjoining States delimiting their common boundary. They do not bind the parties until they are constituted formal agreements, for example, by exchange of notes.'[337] In the context of the outer continental shelf, as already stated, the recommendations of the CLCS do not become binding except in the event that the coastal State establishes the limits of the shelf on the basis of the Commission's recommendations.

It must be noted that the proposals which later became article 76 of UNCLOS made mention of a body called the Continental Shelf Boundary Commission.[338] This indicates that the idea of creating the CLCS originates, to some extent, from the long tradition of mixed boundary commissions. However, as Suarez points out, the CLCS is different from other technical boundary commissions since '[i]t is the only technical and scientific commission of its kind that is established by a multilateral convention with the principal mandate of evaluating claims for a continental shelf beyond 200 nm'.[339] It can also be pointed out that such mixed boundary commissions have usually been established on an *ad hoc* basis with limited and highly temporary functions in resolving bilateral disputes.[340] It is therefore questionable how far any resemblance goes between the CLCS and mixed boundary commissions, although the CLCS can be seen as an entity created in the spirit of mixed boundary commissions.

3.3.4. Does the CLCS Represent the International Community?

The question can be asked of whether the CLCS represents the international community. This can be answered in two ways. From a formal perspective which focuses mainly on the organisation of the CLCS and its procedural function, on the one hand, or from a more substantive viewpoint that focuses on its mandate, on the other.

From a formal viewpoint, which can be said to be more legalistic, McDorman has argued that it is not possible to view the CLCS as the representatives of 'the international community of states in a manner similar to, for example, the way in

[337] Ibid 35.
[338] Discussed in chapter 3.5.3.
[339] Suarez (n 23) 75.
[340] Cukwurah (n 9) 231.

which the United Nations or other intergovernmental organisations can be said to represent or speak for its member states'.[341] Moreover, McDorman argues that '[t]he wording of the LOS Convention contains no explicit delegation of authority from state parties to the LOS Convention to the Commission and no explicit yielding by state parties of their ability to claim, react, protest or reject actions related to the outer limits of the continental shelf'.[342] In support of this argument he quotes the statement of the chairman of the CLCS that the Commission is an 'autonomous body established by the Convention with no formal accountability to the Meeting of States Parties'[343] and the work of a former member of the Commission which stated that 'the Commission is really comprised of individuals, and not States or representatives of States'.[344]

This view must be questioned. It is not clear cut that the CLCS can be seen as a completely autonomous entity with no formal accountability to anyone. After all, CLCS has a strong connection to the Meeting of States Parties. Indeed the CLCS has sought advice from the Meeting which suggests that they themselves may feel accountability towards the institution. This seems to indicate that States parties are able to hold the CLCS to account to some degree. In addition, as will be discussed in next chapter, an international court or tribunal could invalidate a decision of the CLCS which would seem to be another accountability mechanism.

From a substantive viewpoint it can be argued that the CLCS represents the international community, or at least works for the common good of the international community, since its work promotes stability and predictability of international relations. The important role played by the CLCS for the international community has been touched upon in various fora. For example, the UN Legal Counsel stated in an address to the CLCS:

> [T]he work of the Commission was one of the vital elements in the establishment of the last of the extensive limits of national jurisdiction, and it brought much-needed precision to its important task of determining whether a coastal State, in delineating the outer limits of its continental shelf where

[341] Ted McDorman, 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World' (2002) 17 IJMCL 301, 311.
[342] Ibid.
[343] *Report of the eleventh Meeting of States Parties*, Doc. SPLOS/73 (14 June 2001) 4, para. 61.
[344] Francis (n 318) 142.

it extended beyond 200 nautical miles, had correctly applied the complex formulas contained in article 76 of the Convention.[345]

3.3.5. The Commission's Connections to other International Entities

3.3.5.1. Independence of the Commission

The CLCS has no formal ties with ITLOS or the Authority. The Commission is however not isolated from other international organs. It is part of the UN system with various ties to UN entities, especially the Secretariat and the Meeting of States Parties, where it has been granted observer status.[346] The Secretariat has the obligation to 'perform all the work that the Commission may require for the effective performance of its functions'.[347] In practice, the employees of the Division for Ocean Affairs and the Law of the Sea execute the roles on behalf of the Secretariat and the Secretary-General.[348] It must also be noted, as mentioned above, that the CLCS can cooperate with other international entities. Article 3(2) of Annex II to UNCLOS provides:

> The Commission may cooperate, to the extent considered necessary and useful, with the Intergovernmental Oceanographic Commission of UNESCO, the International Hydrographic Organization and other competent international organizations with a view to exchanging scientific and technical information which might be of assistance in discharging the Commission's responsibilities.

Such cooperation is supposed to be 'decided by the Commission on a case-by-case basis'.[349] Moreover, it must be noted that although the Commission has no formal connection with ITLOS or the Authority the activities of these three bodies 'are complementary to each other so as to ensure coherent and efficient implementation of the Convention'.[350] To conclude, the Commission is an independent body with various ties to UN bodies and is supposed to work in harmony with the other two bodies established by UNCLOS.

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[345] CLCS/42 (n 259) 2 para. 6. See also *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Twentieth Session, Doc. CLCS/56 (4 October 2007) 2 para. 6.
[346] See *Report of the twelfth Meeting of States Parties*, SPLOS/91 (13 June 2002) 14 para. 107; See also rule 18(4) of the Rules of Procedure of Meetings of States Parties, SPLOS/2/Rev.4 (24 January 2005).
[347] Rule 16(3) of the Rules of Procedure.
[348] Zinchenko (n 299) 229. According to article 2(5) of Annex II to UNCLOS the Secretary-General of the UN is supposed to provide the secretariat of the CLCS.
[349] Rule 56 of the Rules of Procedure.
[350] *Bay of Bengal Case* (n 4) 110, para. 373.

3.3.5.2. Meeting of States Parties

With regard to the relationship of the CLCS with other international entities, the relations between the Meeting of States Parties to UNCLOS[351] and the Commission is the most interesting from the perspective of international law-making. Even though it is true that the CLCS is not formally accountable to the Meeting of States Parties – as the chairman of the CLCS has stated – the Commission has sought the advice of the Meeting on various issues to legitimise important decisions such as the adoption of the Rules of Procedure and its annexes.[352] Moreover, the Meeting of States Parties has made *de facto* modifications[353] to some administrative provisions of UNCLOS relevant to the CLCS. Interestingly, 'there is a clear indication that once they were made, the decisions were deemed to be binding on the States Parties and they could not be reversed by a subsequent majority decision'.[354]

The first decision of this kind taken by the Meeting of States Parties was to postpone the first election of members to the Commission with the consequence that the elections were not held within 18 months after the date of entry into force of UNCLOS, as is required by article 2(1) of Annex II to UNCLOS.[355] As aforementioned, article 2(3) of Annex II to UNCLOS provides that '[n]ot less than three members shall be elected from each geographical region'. However, the Meeting of States Parties accepted that '[f]or the purpose of the first election only, the Group of Eastern European States has decided not to fill the third seat to which it

[351] There exist a 'basic disagreement between States holding that the [Meeting] should not address questions of substance and those holding the opposite view'. Tullio Treves, 'The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention' in Alex Oude Elferink (ed.) Stability and Change in the Law of the Sea: The Role of the LOS Convention (Martinus Nijhoff 2005) 55, 64. This is likely to be the reason why substantive discussions on the law of the sea have taken place in other fora such as the UNGA. See James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011) 74. The dispute regarding the powers of the Meeting of the States Parties is not purely legal in nature 'but also a political issue about which is the most appropriate forum for considering law of the sea issues'. Ibid 73.

[352] See *Report of the seventh Meeting of States Parties*, Doc. SPLOS/24 (12 June 1997) 8-9, paras. 29-33; See also *Report of the eighth Meeting of States Parties*, Doc. SPLOS/31 (4 June 1998) 11, para. 42; *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Second Session, Doc. CLCS/4 (17 September 1997) 2-3 para. 12; *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Third Session, Doc. CLCS/7 (15 May 1998) 4, para. 15.

[353] See the discussions on possible different avenues to amending the time limits in SPLOS/73 (n 343) 12-3, paras. 78-80; See also Harrison (n 351) 70-83.

[354] Ibid 80.

[355] See SPLOS/5 (n 302) 7, para. 20.

is entitled'.[356] The Group of Eastern European States permitted that seat to be filled by a member from the Western European and Other States Group.[357] The third decision of this kind taken by the Meeting of States Parties was to delay the date of commencement of the ten-year period for making submission.[358] The fourth was to accept that the previously delayed commencement date could be 'satisfied by submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission'.[359]

All of these decisions clearly contradict provisions in Annex II to UNCLOS and were made outside the amendment procedure found in articles 312 and 313 of the Convention. It perhaps seems peculiar that the amendment procedure of the Convention was obviated, however, there are strong practical reasons for doing so:

> Amendment of the 1982 UNCLOS has proved [unattractive] to states parties. Amendments proposed at a negotiating conference can be adopted by vote when all efforts to reach consensus have failed, but once such a conference is convened there is again no means of controlling what other amendments are put forward. A simplified procedure provided for in Article 313 eliminates this risk by dispensing with the need for a negotiating conference. Non-objection will secure adoption of an amendment, but it only takes one objection for the procedure to fail. A further drawback is that only the treaty parties can initiate amendment procedures. The non-parties, including the United States, would have no vote in such procedures, yet their participation in UN discussions on law of the sea shows their continuing interest in further development of the Convention and related agreements.[360]

Harrison points out that the main arguments for using the decisions of the States Parties to modify the provisions of UNCLOS are that 'this mechanism is quicker than invoking the amendment procedures, which not only require the circulation of proposed amendments to States Parties, but also formally require individual consent before amendments become binding'.[361] Decisions of the Meeting of the States

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[356] *Report of the sixth Meeting of States Parties,* Doc. SPLOS/20 (20 March 1997) 6, para. 13.
[357] Ibid.
[358] See *Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea, Eleventh Meeting of the State Parties*, Doc. SPLOS/72 of (29 May 2001).
[359] See *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a),* Eighteenth Meeting, Doc. SPLOS/183 (20 June 2008) 2.
[360] Boyle & Chinkin (n 229) 242-3.
[361] Harrison (n 351) 82. It must also be borne in mind that it is risky to reopen a negotiated text with interwoven provisions that cannot be seen in isolation. See Boyle & Chinkin (n 229) 21-2.

Parties can, by contrast, have immediate effect.[362] Further justifications for the non *ultra vires* of the *de facto* amendments are that they were adopted by consensus[363] at the Meeting of States Parties and can be seen as an amendment by agreement by the Parties in the meaning of the VCLT.[364] The ILC's Commentary to the VCLT notes that '[a]n amending agreement may take whatever form the parties to the original treaty may choose. Indeed … a treaty may sometime be modified even by an oral agreement or by a tacit agreement evidenced by the conduct of the parties in the application of the treaty.'[365] Aust notes similarly 'it is perfectly possible to amend a treaty by an agreement which does not itself constitute a treaty, or, possibly, by an oral agreement'.[366]

An alternative but related argument is that the decisions constitute 'subsequent agreement between the parties regarding the interpretation or application of the treaty'.[367] The VCLT Commentary notes that 'an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation'.[368] Aust explains that since parties to a treaty 'can agree later to modify the treaty, they can subsequently also agree on an authoritative interpretation of its terms, and this can amount in effect to an amendment'.[369] There is in this context 'no need for further treaty, since the paragraph refers deliberately to an "agreement", not a treaty. Provided the purpose is clear, the agreement can take

[362] Harrison (n 351) 82.
[363] Consensus, unlike an unanimous decision, is arrived at without a vote. 'It does not follow that all participants are necessarily in favour of such a decision ... There may be various explanations for the absence of such objections, and one of the more subtle advantages of a consensus procedure is that some states might indeed have voted against if offered the option.' Boyle & Chinkin (n 229) 157-8. The roots of the consensus approach lies in the Third Conference and is today a common practice at the United Nations, especially in matters related to the law of the sea. See e.g. John Norton Moore, 'Overview of the UNCLOS Negotiations' in Myron Nordquist, John Moore & Tomas Heidar (eds.) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 13, 13.
[364] Article 39 of the VCLT provides that '[a] treaty may be amended by agreement between the parties'.
[365] *Draft Articles on the Law of Treaties with Commentaries*, 1966, ILC Yearbook (vol. II) 232-3 (VCLT Commentary).
[366] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2010) 263.
[367] Ibid. Article 31(3)(a) reads: 'There shall be taken into account, together with the context … any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.'
[368] VCLT Commentary (n 365) 221.
[369] Aust (n 366) 239; See also Boyle & Chinkin (n 229) 244.

various forms, including a decision adopted by meeting of the parties.'[370] This is indeed the avenue adopted by the Meeting of States Parties. Aust points out if a 'treaty does have a built-in amendment procedure, the process can be lengthy and uncertain, especially if it is a multilateral treaty and any amendment is subject to ratification'.[371] He notes that even if this is the case, and depending on circumstances, particularly when the modification is essentially procedural, 'it may be possible to embody it in an agreement as to the application of the treaty'.[372] Aust argues that '[t]his technique is particularly useful if there is a need to fill a lacuna, to update a term or postpone the operation of a provision'.[373]

3.4. Recommendations and Resubmissions

3.4.1. Introduction

The recommendations of the CLCS are a key element in the establishment of the outer limits of the continental shelf beyond 200 nm. It can be difficult for a coastal State to argue that its established outer limits are final and binding if the limits are not based on the recommendations of the Commission. The procedure of the CLCS is complicated and time-consuming, but is nevertheless appropriate when one bears in mind the scale of interests involved. It has been pointed out that '[t]he purpose of article 76 is to define the continental shelf with a view to promoting certainty and stability for the coastal States, in the first instance, but also for the International Seabed Authority in the exercise of its responsibilities and for the international community generally'.[374] Franckx has noted that '[t]he CLCS seems to be the naturally ally of the common heritage of mankind, for it is generally admitted that this body was created to act as a watchdog against excessive outer continental shelf claims by coastal states'.[375] Consequently, the Commission 'offers protection to the common heritage of mankind against the expansionist tendencies of coastal states'.[376]

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[370] Aust (n 366) 239; See also Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 217, 220.
[371] Aust (n 366) 241.
[372] Ibid. Aust warns that 'the use of such means should be done cautiously and sparingly. The distinction between application and amendment is not always easy to draw. Problems could be caused if such means are used for a purpose which should really be done by formal amendment to the treaty.' Ibid.
[373] Ibid.
[374] Smith & Taft (n 123) 24.
[375] Franckx (n 8) 558-9.
[376] Ibid 559.

In its effort to protect the common heritage of mankind, the main tool at the disposal of the Commission is its recommendations. Importantly, the Commission provided in one of its recommendations that '[t]he Recommendations of the Commission only deal with issues related to article 76 and Annex II to the Convention and are without prejudice to matters relating to delimitation between states or application of other parts of the Convention or any other treaties'.[377]

3.4.2. Main Aspects of the Procedure

The Rules of Procedure provide that '[t]he Commission shall hold sessions at least once a year and as often as is required for the effective performance of its functions under the Convention, in particular, to consider submissions by coastal States and to make recommendations thereon'.[378] In practice, the Commission has met twice a year for a few weeks, with some exceptions. It is provided that the Commission, its subcommissions and subsidiary bodies shall try to accomplish their work by general agreement.[379] They 'shall make every effort to reach agreement on substantive matters by way of consensus and there shall be no voting on such matters until all efforts to achieve consensus have been exhausted'.[380]

The principal rule is that recommendations of the Commission are prepared and developed in subcommissions 'composed of seven members, appointed in a balanced manner taking into account the specific elements of each submission by a coastal State' as provided by article 5 of Annex II to UNCLOS. The article also provides that:

> Nationals of the coastal State making the submission who are members of the Commission and any Commission member who has assisted a coastal State by providing scientific and technical advice with respect to the delineation shall not be a member of the subcommission dealing with that submission but has the right to participate as a member in the proceedings of the Commission concerning the said submission.

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[377] CLCS's Australia Recommendations (n 104) 1, para. 5. The statement was a response to Australia's outer continental shelf claim in Antarctica which the CLCS did not consider. Japan expressed a similar view in a *note verbale* in connection with its own submission to the CLCS. It stated that 'the consideration of submissions by the Commission concerned issues related only to article 76 and annex II to the Convention and was without prejudice to the interpretation or application of other parts of the Convention'. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Twenty-fourth session, Doc. CLCS/64 (1 October 2009) 8, para. 25.

[378] Rule 2(1) of the Rules of Procedure. It also provides that '[a] session may include several meetings of the Commission and its subcommission'.

[379] Ibid rule 35(1).

[380] Ibid rule 35(2).

In other words, members of the Commission deemed insufficiently impartial to work on a coastal State's submission in a subcommission are deemed to be impartial to do so before the whole Commission. It has been pointed out that this arrangement 'clouds perceptions of impartiality'.[381] On the other hand, it has been argued that '[t]he participation in decision-making of nationals or advisers of a coastal State would, if anything inspire more confidence in the coastal State with regard to the Commission's recommendations'.[382]

Article 5 of Annex II is elaborated upon in rules 42 and 51(4) of the Rules of Procedure. According to rule 42(2) '[t]he term of a subcommission shall extend from the time of its appointment to the time that the submitting coastal State deposits,' the charts and relevant information, in accordance with article 76(9) of UNCLOS. To deal with the increased workload of the Commission the decision was taken to amend some provisions of the Rules of Procedure.[383] Following the amendments, rule 51(4 bis) provides that '[u]nless the Commission decides otherwise, only three subcommissions shall function simultaneously while considering submissions'. Furthermore, rule 51(4 ter) provides that '[t]he submissions shall be queued in the order they are received. The submission next in line shall be taken for consideration by a subcommission only after one of the three working subcommissions presents its recommendations to the Commission.' Given the current workload of the CLCS, several decades will be required for its mandate to be fulfilled.[384]

Part V of Annex III to the Rules of Procedure sets out the procedure regarding the preparation of recommendations by a subcommission. Para. 11 of the Annex deals with the formulation of a recommendation. It provides as follows:

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[381] McDorman, 'The Role of the Commission on the Limits of the Continental Shelf' (n 341) 312. In the tenth session of the CLCS in 2002 when the CLCS was deciding upon the procedure of the Russian submission, '[i]t was decided that, in order to ensure the highest possible integrity of the proceedings, the members of the Commission who were nationals of a State with opposite or adjacent coasts, or of a State which might have a dispute with the submitting State regarding the submission, should not be selected as members of the Subcommission'. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Tenth Session, Doc. CLCS/32 (12 April 2002) 3, para. 15.

[382] Eiriksson, 'The Case of Disagreement between a Coastal State and the CLCS' (n 293) 254.

[383] See *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Eighteenth Session, CLCS/52 (6 October 2006) 8, para. 38.

[384] The workload of the Commission was light in its earlier years. As the submission deadline drew closer, more and more submissions were made with the consequence that the CLCS will have a heavy workload for the next few decades.

> 1. The recommendations prepared by the subcommission shall be in accordance with article 76 of the Convention, the Statement of Understanding, these Rules and the Guidelines.
> 2. The recommendations prepared by the subcommission shall focus on the data and other material submitted by the coastal States in support of the establishment of the outer limits of their continental shelf.
> 3. The recommendations prepared by the subcommission shall include a summary thereof, and such summary shall not contain information which might be of a confidential nature and/or which might violate the proprietary rights of the coastal State over the data and information provided in the submission. The Secretary-General shall make public the summary of the recommendations upon their approval by the Commission.

The Annex includes detailed provisions on the drafting of recommendations[385] and their adoption by the subcommission.[386] The same rules regarding the decision-making process of the Commission apply vis-à-vis the subcommission. Furthermore, the Annex provides that '[t]he recommendations prepared by the subcommission shall be submitted in writing to the Chairperson of the Commission in accordance with rule 51, paragraph 4, through the Secretariat'.[387] The submission marks the end of the subcommission's mandate. It is then up to the Commission to 'consider and approve or amend the recommendations prepared by the subcommission'.[388] A majority of two thirds of Commission members present and voting is required for approval by the Commission of the subcommission's recommendations.[389] In other words, the recommendations do not have to be adopted by consensus.

3.4.3. Adopted Recommendations and Resubmissions

The recommendations of the Commission must 'be submitted in writing to the coastal State which made the submission and to the Secretary-General of the United Nations'.[390] The CLCS has, at the time of writing, issued 18 recommendations. If the coastal State accepts the recommendations, the work of the Commission – in relation to that submission – is concluded. If it does not 'the coastal State shall, within a reasonable time, make a revised or new submission to the Commission'.[391]

It can be difficult for third States to verify whether the recommendations of the Commission have been followed by a coastal State because of the rules on

[385] Para. 12 of Annex III of the Rules of Procedure.
[386] Ibid para. 13.
[387] Ibid para. 14. The rule is based on article 6(1) of Annex II to UNCLOS.
[388] Rule 53(1) of the Rules of Procedure.
[389] See article 6(2) of Annex II to UNCLOS. In this context it must be borne in mind that the Commission should by all means try to reach consensus. See rule 37 of the Rules of Procedure.
[390] Article 6(3) of Annex II to UNCLOS. The provision is elaborated further in rule 53(3) of the Rules of Procedure.
[391] Article 8 of Annex II to UNCLOS: See also rule 53(4) of the Rules of Procedure.

confidentiality.[392] To improve this state of affairs, the CLCS decided 'that the recommendations should include an executive summary, containing a general description of the extended continental shelf, as well as a set of coordinates to identify the line describing the outer limits recommended by the Commission and illustrative charts, if appropriate'.[393]

3.4.3.1. Adopted Recommendations

As aforementioned the CLCS has thus far adopted 18 recommendations. The first recommendations concerned the Russian submission, the first to be received by the CLCS. The submission made claims to the Arctic Ocean, the Barents Sea, the Bering Sea and the Sea of Okhotsk. Five States reacted to the submission: Canada, Denmark, Japan, Norway and the US. Japan noted that the Russian submission did not mention any territorial disputes between the States although a dispute of that kind clearly exists between them.[394] Canada and Denmark criticised an absence of specific data.[395] The US pointed out that the submission contained major flaws regarding the Arctic Ocean.[396] Norway mentioned the ongoing delimitation between the countries (which has now been finalised, as discussed in chapter five).[397] Consequently, the Commission did not accept the submission. The Commission's recommendations were summarised at UNGA in the following manner:

> 39. In the case of the Barents and Bering seas, the Commission recommended to the Russian Federation, upon entry into force of the maritime boundary delimitation agreements with Norway in the Barents Sea, and with the United States of America in the Bering Sea, to transmit to the Commission the charts and coordinates of the delimitation lines as they would represent the outer limits of the continental shelf of the Russian Federation extending beyond 200 nautical miles in the Barents Sea and the Bering Sea respectively.
> 40. Regarding the Sea of Okhotsk, the Commission recommended to the Russian Federation to make a well-documented partial submission for its extended continental shelf in the northern part of that sea …

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[392] L.D.M. Nelson, 'The Settlement of Disputes Arising from Conflicting Outer Continental Shelf Claims' (2009) 24 IJMCL 409, 418 fn. 19; See also Macnab (n 314) 1ff; Alex Oude Elferink, 'Openness' and Article 76 of the Law of the Sea Convention: The Process Does Not Need to be Adjusted' (2009) 40 ODIL 36ff.

[393] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, Twelfth session, CLCS/36 (2 May 2003) 3, para. 10.

[394] See *Note Verbale of the Permanent Mission of Japan to the United Nations*, SC/02/084 (25 February 2002) Doc. CLCS.01.2001.LOS/JPN.

[395] See *Note Verbale of the Permanent Mission of Denmark to the United Nations*, File no. 119.N.8 (4 February 2001) Doc. CLCS.01.2001.LOS/DNK; *Note Verbale of the Permanent Mission of Canada to the United Nations*, Note No. 0145 (18 January 2002) Doc. CLCS.01.2001.LOS/CAN.

[396] See *Note Verbale of the Permanent Mission of the United States of America to the United Nations* (28 February 2002) Doc. CLCS.01.2001.LOS/USA (US response to Russia's CLCS submission).

[397] See *Note Verbale of the Permanent Mission of Norway to the United Nations* (20 March 2002) Doc. CLCS.01.2001.LOS/NOR.

> 41. As regards the Central Arctic Ocean, the Commission recommended that the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations.[398]

The next submission received by the CLCS was from Brazil. Brazil received its recommendations in 2007 which have, however, not been published on the website of the CLCS. There is speculation that the reason for this is that 'Brazil disagrees with the recommendations to such an extent that it does not intend to establish its outer limits "on the basis of" them'.[399]

The majority of the CLCS' recommendations have been uncontroversial. Disagreements between the Commission and the submitting State have usually been resolved in the interactions between the CLCS and the representatives of the submitting State. The disagreement has often regarded the location of a small number of foot of the slope points. Some recommendations have, however, raised questions as to whether the CLCS has reached a reasonable conclusion.[400] States have in most instances, however, decided not to rock the boat and have accepted the recommendations of the CLCS. A cost-benefit analysis may explain why. The toughest documented confrontation between a submitting State and the Commission, publicly available, concerns the UK's partial submission regarding Ascension Island.

The UK made a partial submission regarding the Ascension Island in May 2008. In its recommendations from April 2010 the CLCS fully rejects the submission.[401] The main reasons for the rejection were that Ascension Island, which is a 'sub-aerial expression of a volcanic seamount that is located in the central Atlantic Ocean about 90 km west of the median rift valley of the Mid Atlantic Ridge'[402] was, in the view of the CLCS, not an integral part of the Mid-Atlantic Ridge mainly because its edifice sits directly on deep ocean floor.[403] Subsequently,

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[398] Oceans and the Law of the Sea: Report of the Secretary-General, A/57/57/Add.1 (8 October 2002) 9-10, paras. 39-41 (Oceans & LOS 2002 Report). The Russian submission and the CLCS recommendations are discussed thoroughly in McDorman, 'A Note on the Commission on the Limits of the Continental Shelf and the Submission of the Russian Federation' (n 331) 467ff; Alex Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' in Myron Nordquist, John Moore & Tomas Heidar (eds.) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 263, 270-4.

[399] Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 381, fn. 84.

[400] Serdy has recently criticised the interpretation and application of UNCLOS by the CLCS rather harshly. See ibid 361-78.

[401] CLCS's Ascension Island (UK) Recommendations (n 76) 15, para. 54.

[402] Ibid 3, para. 16.

[403] Ibid 14, para. 48.

the UK could not establish foot of the slope points that created entitlement to the outer continental shelf. The UK did not take this conclusion lightly. In a paper which summarises the legal view of the UK, three fundamental issues are discussed which the UK believes the CLCS got wrong. These are: The definition of 'deep ocean floor' in article 76(3), the definition of 'natural prolongation' in article 76(1) and the use of morphology over geology.[404] These points are of general importance and touch upon fundamental issues about the interpretation of article 76 and the nature of the CLCS.

The most important issue at stake was the interpretation of the phrase 'deep ocean floor' within the meaning of article 76(3) of UNCLOS. The provision states that the continental margin does not include the deep ocean floor with its oceanic ridges. The subcommission reached the conclusion that mid-oceanic ridges, especially the Mid-Atlantic Ridge, represent 'deep ocean floor' in the context of article 76(3). In fact, it seems that the subcommission was of the opinion that all mid-oceanic ridges are deep ocean floor.[405] This interpretation could have a significant impact for other submitting States located on mid-ocean ridges. The UK made several arguments from the perspective of the law of treaties and science in attempting to show that the CLCS had erred. UK for instance pointed out:

> [I]t follows that terms and phrases in the Convention which may be technical terms of art, do not necessarily import a technical meaning for the purposes of the Convention. Article 31(4) of the Vienna Convention provides that 'A Special meaning shall be given to a term if it is established that the parties so intended …'. It is clear for the purposes of article 76 that the State Parties did not intend for a number of the concepts, (e.g. 'deep ocean floor' in 76(3), or 'continental shelf' in 76(1)) to be given their scientific or technical meaning.[406]

Moreover, the UK criticised the CLCS for taking a reverse approach to the establishment of the outer continental shelf by 'first establishing the extent of deep ocean floor'[407] instead of taking a land-based approach since '[t]he sovereign rights of coastal states with respect to continental shelf emanate from their sovereignty over the land territory'.[408] Furthermore, the UK provided that in its view 'the term "oceanic ridges" in article 76(3) does not encompass all undersea ridges because

[404] UK Ascension Paper (n 99) 2, para. 6.
[405] In its recommendations the CLCS made an important comment regarding ridges. The subcommission noted that the naming of the Mid Atlantic Ridge was largely historic and pointed out that 'the flanks of [Mid Oceanic Ridges] are actually normal deep ocean floor that has aged, cooled and thermally subsided as the oceanic lithosphere moved away from the active spreading centre'. CLCS's Ascension Island (UK) Recommendations (n 76) 7, para. 26.
[406] UK Ascension Paper (n 99) 4, para. 14.
[407] Ibid para. 15.
[408] Ibid para. 16.

76(6) specifically refers to another category, i.e. "submarine ridges", and expressly recognises that extended continental margin may be established by reference to such ridges'.[409]

Of more general importance, the CLCS disregarded the natural prolongation concept of article 76(1). In its recommendations, the CLCS made statements regarding its interpretation of UNCLOS, including that: 'The outer edge of the continental margin in the sense of article 76, paragraph 3, is established by applying the provisions of article 76, paragraph 4, through measurements from the [foot of the slope].'[410] No explanation was given for this interpretation. The UK responded by criticising the CLCS for proceeding 'on the basis that the outer edge of the continental margin in the sense of article 76(3), is established by applying the provisions of Article 76(4) through measurements from the foot of continental slope'.[411] The UK pointed out that '[b]y jumping immediately to the formulae in 76(4) in this way the Subcommission overlooks the requirement in Article 76(1) to first determine the extent of natural prolongation of the land territory';[412] something which is also recognised in article 76(3).[413] Consequently, the UK stated that it can 'not consider that natural prolongation, an inherent property of any landmass, can be defined by applying the formulae in Article 76(4)'.[414] Unfortunately for the UK, on this issue ITLOS adopted the same position as the CLCS in the *Bay of Bengal Case*, as described in the previous chapter. In other words, ITLOS approved the Commission's interpretation on this matter.

The third issue the UK had difficulty accepting was the CLCS' preference for morphology. The UK stated that '[t]hroughout its examination of the United Kingdom's submission, the Subcommission has shown strong preference for relying on morphological over geological criteria'.[415] Moreover, '[o]n a number of occasions morphological arguments have been adopted by the Subcommission as the only criteria, to the exclusion of geology'.[416] The UK stated that it found 'no basis in the

[409] Ibid 4-5, para. 18.
[410] CLCS's Ascension Island (UK) Recommendations (n 76) 6, para. 22(ii).
[411] UK Ascension Paper (n 99) 5, para. 22.
[412] Ibid.
[413] Ibid.
[414] Ibid 5, para. 23.
[415] Ibid 6, para. 26.
[416] Ibid.

Convention for weighting one type of data over another'.[417] It noted that article 76(4)(b) actually 'calls for the use of a range of data, not just morphology'[418] and complained that the Commission dealt with unusual circumstances in a general manner.[419] Finally, the UK noted that it did 'not accept that there is any one scientific criterion which should be relied on to the exclusion of others in applying Article 76' and that 'this was not the intention of the framers of the Convention. Why else would the Convention provide for a range of disciplines to be represented on the Commission?'[420] Again unfortunately for the UK, ITLOS adopted a geomorphological view in the *Bay of Bengal Case* to the exclusion of a geological one.

In its concluding remarks, the UK noted that 'Article 76 appears in an international agreement, and would have to be interpreted in accordance with the Vienna Convention on the Law of Treaties and the principles laid down in many international judicial decisions'.[421] Finally, the UK stated that '[s]ince there are clear differences in legal interpretation between the United Kingdom and the Subcommission, we suggest that the Commission should consider seeking specialised outside legal advice on these questions'.[422] The CLCS seems to have responded to this request since this was one of the topics discussed at the twenty eighth session of the CLCS.[423] In the next session, however, it decided not to pursue the issue any further.[424]

Given the fact that ITLOS interpreted Article 76 in harmony with the Commission's interpretation of the term natural prolongation and gave geomorphology a superior status, it is doubtful whether the CLCS would adopt a different position on these issues were the UK to make a new submission in accordance with article 8 of Annex II to UNCLOS. It is also doubtful whether an

[417] Ibid.
[418] Ibid.
[419] Ibid para. 28.
[420] Ibid 7, para. 29.
[421] Ibid para. 30.
[422] Ibid para. 32.
[423] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Twenty-eighth session, Doc. CLCS/72 (16 September 2011) 10 paras. 37-40.
[424] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Twenty-ninth session, Doc. CLCS/74 (30 April 2012) 10, para. 52.

international court or tribunal would adopt a different position on the same issue were the UK to somehow manage to bring the Commission's application or interpretation of article 76 before an international court or tribunal, as they tend to try to avoid undermining the coherence of international law, as discussed in next chapter. The disagreement between the UK and the CLCS regarding the definition of 'deep ocean floor' is, however, more open for debate since the *Bay of Bengal Case* did not address this issue.

3.4.3.2. Resubmissions

As noted above, if the coastal State does not accept the recommendations of the Commission 'the coastal State shall, within a reasonable time, make a revised or new submission to the Commission'.[425] No resubmissions have thus far been made. It is expected, however, that Russia will make such a resubmission in the near future. As no special rules apply to resubmissions, the conclusion may be drawn that such resubmissions must once again go through the whole process before the CLCS. Franckx calls this result a 'legalistic carousel'.[426] It has been optimistically noted, however, that '[a]lthough this process can in theory continue without end, it is to be expected that possibly already after the first revised or new submission it will emerge that the difference between the coastal State and the CLCS cannot be resolved'.[427] The ILA Committee notes that '[t]he coastal State is to fulfil in good faith the obligations assumed under article 76 of the Convention and the CLCS is to make recommendations in accordance with article 76'.[428] This does not however 'amount to an obligation for the coastal State to accommodate the views of the CLCS or vice versa'.[429] There is no enforcement procedure for recommendations of the Commission and, as will be pointed out in chapter four, the CLCS does not have standing before the dispute settlement mechanisms of Part XV of UNCLOS. Consequently, this disagreement cannot be solved directly before an international

[425] Article 8 of Annex II to UNCLOS; See also rule 53(4) of the Rules of Procedure.
[426] Franckx (n 8) 556. The process has also been called a 'ping-pong' procedure. See Piers Gardiner, 'The Limits of the Area beyond National Jurisdiction – Some Problems with Particular References to the Role of the Commission on the Limits of the Continental Shelf' in Gerald Blake (ed.) *Maritime Boundaries and Ocean Resources* (Croom Helm 1987) 63, 69.
[427] 2004 ILA Report (n 71) 817.
[428] Ibid.
[429] Ibid.

court or tribunal.[430] It has been argued that 'in the case of a continued difference between the Commission and the coastal State, the latter eventually might establish the outer limits of the continental shelf in accordance with its submission'.[431] In this case, however, the outer limits will not be opposable to other States.[432]

There is no fixed time limit for resubmission. The only requirement is that a resubmission should be made within a reasonable period of time. The ILA Committee has noted that '[w]hat constitutes a reasonable time will depend on an assessment of all the circumstances of the particular case'.[433] It is possible that '[a] reasonable time may be a considerable period of time if the recommendations of the Commission imply that a coastal State will have to gather further data on its continental shelf'.[434] It also notes that '[j]ust as is the case for compliance with the time limits in article 4 of Annex II to the Convention, article 8 does not indicate what consequences attach to non-compliance with the requirement to make a new or revised submission within a reasonable time'.[435] It is highly unlikely that there would arise any consequences as the CLCS process has no impact on the entitlement of the State to the continental shelf, because the coastal State's right to the continental shelf is inherent. If, however, the coastal State accepts a recommendation of the Commission, the coastal State may establish the outer limits of the continental shelf on the basis thereof recommendations and in accordance with the appropriate national procedures, such limits becoming final and binding.

3.5. Four Fundamental Issues of Interpretation

3.5.1. Are States obliged to make a Submission to the CLCS?

Article 4 of Annex II provides that:

> Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the

[430] Eiriksson argues when addressing this issue, however, that 'if a State Party feels that another State Party is not fulfilling its obligations in good faith, it could bring an action under the Convention. One can note that in many cases before international tribunals this element is mentioned at least as a subsidiary issue.' Eiriksson, 'The Case of Disagreement between a Coastal State and the CLCS' (n 293) 256.
[431] 2004 ILA Report (n 71) 818. See also Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' (n 398) 274-5.
[432] 2004 ILA Report (n 71) 818
[433] Ibid.
[434] Ibid.
[435] Ibid.

> Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State.[436]

UNCLOS entered into force on 16 November 1994. This means that coastal States were required to make their submissions no later than 16 November 2004. At the eleventh meeting of the State Parties to UNCLOS in May 2001, however, it was decided that the date of commencement of the 10-year time period would be 13 May 1999[437] for a State for which the Convention entered into force before that date.[438] A total of 129 member States to UNCLOS were subject to the amended commencement date.[439] The deadline was delayed mainly because of problems faced by developing States, particularly in compliance with the time requirements. At the eighteenth Meeting of States Parties of UNCLOS in June 2008, the decision was taken that the time period referred to in article 4 of Annex II to the Convention and the previous decision of the Meeting of the State Parties to delay the commencement date 'may be satisfied by submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission'.[440] The decision was based on several factors such as the workload of the Commission, coastal States inherent right to the continental shelf and the fact 'that some coastal States, in particular developing countries ... continue to face particular challenges in submitting information to the Commission ... due to a lack of financial and technical resources and relevant capacity and expertise, or other similar constraints'.[441] At the time of writing, the CLCS has received 45 communications from a total of 42 coastal States containing preliminary information with regard to future submissions to the CLCS.[442] Franckx has summarised the deadline

[436] There exists an exception to this rule in para. 3 of Annex I to the Rules of Procedure regarding so-called partial submissions. Partial submissions are discussed in chapter 3.6.4.
[437] This is the date of the adoption of the Scientific and Technical Guidelines. The date also marked the completion of the Rules of Procedure and the modus operandi.
[438] See SPLOS/72 (n 358); SPLOS/73 (n 343) 13, para. 81.
[439] 'Chronological lists of ratification of, accessions and succession to the Convention and related agreements as at 03 June 2011' <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 16 July 2012 (List of ratification).
[440] SPLOS/183 (n 359) 2.
[441] Ibid.
[442] Preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles at 19 October 2011 <http://www.un.org/depts/los/clcs_new/commission_preliminary.htm> accessed 16 July 2012.

development and stated that 'from a fixed deadline on paper, the State Parties to the 1982 Convention have moved to a rather flexible one in practice, which leaves ample discretion to the coastal states when selecting the date of final submission of the supporting data'.[443]

According to article 4 of Annex II to UNCLOS, it is obligatory for a coastal State wanting to establish a continental shelf beyond 200 nm to make a submission, or in the words of the ICJ: '[A]ny claim of continental shelf rights beyond 200 miles must be in accordance with article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.'[444] If a coastal State fails to do so, whatever the time limits for that State might be, it does not lose its rights over the outer continental shelf.

It must be emphasised that the CLCS is only concerned with the establishment of the outer limits of the outer continental shelf. This is confirmed in article 77(3) of UNCLOS which provides that 'the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or any express proclamation'. However, this provision does not eradicate a coastal State's burden of demonstrating its entitlement to the outer continental shelf. Although a coastal State does not have an obligation to establish its outer continental shelf, certain negative implications may arise from inaction. For instance, '[t]he absence of such an outer limit is bound to raise doubts over the exact extent of the coastal State's rights over this part of its continental shelf, with the attendant difficulties for the coastal State in enjoying these rights'.[445] Another negative consequence is that 'the absence of an internationally recognized outer limit of the continental shelf beyond 200 nautical miles from the baselines in any area may afford a lesser degree of precision as to the area under the jurisdiction of the coastal State'.[446] Furthermore, '[t]he legal uncertainty may hinder the activities to be undertaken in the international seabed area and raise the issue of the payments and contributions which the coastal State should

[443] Franckx (n 8) 555-6.
[444] *Nicaragua/Honduras Case* (n 213) 759, para. 319.
[445] Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' (n 398) 275.
[446] *Issues with respect to article 4 of Annex II to the United Nations Convention on the Law of the Sea*, Eleventh Meeting, Doc. SPLOS/64 (1 May 2001) 12, para. 44.

make annually' according to Article 82 of UNCLOS.[447] Even although there is a possibility that a State will not seek to establish its outer continental shelf, it is highly unlikely that a State will ignore its economic or political interests by at some time failing to make a claim to the outer continental shelf.

3.5.2. Can a Non-Party to UNCLOS make a Submission to the CLCS?

It is commonly discussed in the literature whether non-parties to UNCLOS can make a submission to the CLCS. The reason for this is that article 76(8) uses the term 'coastal State', instead of for example 'State party'. Consequently, it is possible to interpret 'coastal State' as all coastal States, whether a party to UNCLOS or not. If the term encompasses every coastal State, then it would be possible for non-parties to make a submission to the CLCS. Another problem is that 'there does not exist an obligation (or a right) to make a submission to the CLCS concerning the outer limits of the continental shelf'.[448] At the second session of the CLCS, in September 1997, the Commission decided to submit some issues for clarification to the Meeting of States Parties. One of the questions was as follows:

> In the light of article 4 of annex II to the Convention, do the terms 'a coastal State' and 'a State' include a non-State party to the Convention, or do they only refer to a coastal State or a State which is a State Party to the Convention?[449]

At the eighth Meeting of States Parties in 1998, the opinion prevailed that 'the Meeting did not have the competence to provide such a legal interpretation and that the Commission should request the Legal Counsel for an advisory opinion only if the actual need arose'.[450] The question must be asked as to whether it is a correct view that the Meeting of States Parties lacks such competence and whether it is appropriate to rely on the advice of the Legal Counsel in this context. It can be argued that the Meeting of States Parties is exactly the appropriate forum for giving an authoritive interpretation under the law of treaties, as explained earlier.[451] An advisory opinion of the Legal Counsel cannot, by contrast, have the same effect.

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[447] Ibid para. 46.
[448] 2004 ILA Report (n 71) 815.
[449] CLCS/4 (n 352) 3, para. 12.
[450] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Fourth Session, Doc. CLCS/9 (11 September 1998) 2, para. 9; See also SPLOS/31 (n 352) 12, paras. 51-2.
[451] See discussion in chapter 3.3.5.2.

Consequently, the view may be taken that the Meeting of States Parties has erred on this issue.

It is unclear what the actual outcome will be should a situation arise in which an answer to this question is required. According to the VCLT, parties to a treaty can accord rights flowing from the treaty to non-parties of the treaty.[452] Clingan asserted that the CLCS was 'directed to consider the submission by any coastal state, and no distinction is drawn between those that are parties to the Convention and those which are not'.[453] He also stated that a non-party should be able to submit its data to the Commission for confirmation.[454] A different stand was however taken by Koh in his closing statement as President of the Third Conference. Koh expressed the view that because of the revenue-sharing mechanism in Article 82 'a State which is not a party to this Convention cannot invoke benefits of article 76'.[455] The arguments from each perspective will be explored below.

There are four arguments against rights deriving for non-parties. *First*, if article 76(8) is interpreted in a contextual way[456] in conjunction with article 4 of Annex II the term coastal States must be interpreted as a coastal State which is a party to UNCLOS because article 4 states that a coastal State shall make its submission 'as soon as possible but in any case within 10 years of the *entry into force of this Convention for that State*'.[457] This seems to imply that a submission to the CLCS is linked to the date of entry into force of UNCLOS for the relevant submitting State. *Second*, no mention is made of non-parties in the revenue-sharing regime established by article 82 of UNCLOS. This seems to imply that non-parties

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[452] Article 36(1) of the VCLT provides that:

> A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

See also *Free Zones of Upper Savoy and the District of Gex case (France v. Switzerland)* (Judgement) [1932] PCIJ Rep Series A/B No. 46, 95, 147-8.

[453] Clingan, 'Dispute Settlement among Non-Parties to the LOS Convention with Respect to the Outer Limits of the Continental Shelf' (n 282) 497.

[454] See Thomas Clingan, 'The Law of the Sea in Prospective: Problems of States not Parties to the Law of the Sea Treaty' (1987) 30 GYBIL 101, 112.

[455] Third United Nations Conference on the Law of the Sea, Official Records Vol XVII, 193rd Meeting (United Nations 1984) 132, 136, para. 48.

[456] According to article 31(1) of the VCLT '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

[457] Emphasis added.

cannot file a submission to the CLCS because '[t]he regime embodied in article 76 of the Convention resulted from a compromise between coastal States and land-locked and geographically disadvantaged States (LLGDS)'.[458] The trade-off was that 'coastal States secured the possibility of extending their jurisdiction over a wider continental shelf, while LLGDS were included in the revenue sharing regime'.[459] *Third*, nothing in the preparatory work of UNCLOS suggests that non-parties possess this right. *Fourth*, from the perspective of customary international law it must be noted that there is no State practice of this kind supporting the view that non-parties to UNCLOS can submit data and information to the CLCS with the aim of establishing the outer limits of the continental shelf.

On the contrary, it has been noted that 'if a coastal State is *ipso facto* entitled to its continental shelf, it is in the best interest of the international community to have a clear delimitation of the continental shelves of all coastal States, irrespective of whether they are or are not a party to the Convention'.[460] This is especially important when it is kept in mind that the delineated line marks the end of a coastal State's outer continental shelf and the beginning of the Area. In support of this argument, reference has been made to the principle of economic cooperation contained in article 3 of the Charter of Economic Rights and Duties of States[461] which provides that '[i]n the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others'.[462] In this context Zinchencko argued that:

> Although the typical case covered by this principle is that of mineral resources that straddle the boundaries of two or more countries, or on which there are overlapping claims by analogy one could claim that the case of resources shared by the coastal State and the international community (as represented by the Authority) is also covered. Allowing the coastal State to resort to the Commission would amount to an example of cooperation consistent with the Charter of Economic Rights and Duties of States. Even though such a duty to cooperate is by now questionable, there is no mandatory form that such cooperation must take: one form could be recourse to the

[458] Zinchenko (n 299) 238.
[459] Ibid.
[460] Ibid 240.
[461] UNGA Res. 3281 (XXIX) GAOR 29th Session Supp. 30, 50.
[462] It must be noted that the content of the 'charter' is highly controversial and that most of the industrialised Western States either abstained or voted against this resolution. See e.g. David Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?' (1999) 93 AJIL 771, 781.

> Commission to settle the outer limits of the continental shelf in the case of States non-Parties to the Convention.[463]

Of the 61 submissions the CLCS has received, none is from a non-party to UNCLOS and there are currently no indications that a non-party is about to make a submission to the CLCS. As the number of parties to UNCLOS increases, so does the unlikelihood that non-parties will make a submission.

Nevertheless, it must be noted that, if a closer look is taken of the practice of States the picture becomes more complicated. McDorman has pointed out that:

> [T]here appears to exist sufficient state practice based on the 1958 Geneva Convention on the Continental Shelf and upon Article 76 of the LOS Convention itself to support the view that, as a matter of customary international law, a state may legally exercise jurisdiction over the continental margin beyond 200 nautical miles, irrespective of that state's status as a LOS Convention party.[464]

He also notes that the clearest example of this State practice is the maritime boundary delimitation treaty between the US and Mexico regarding the Gulf of Mexico.[465]

The implications of this clash of legal regimes are unclear. It can be argued that the clash is an example of fragmentation in the law of sea. On the other hand it can be argued that there are two different legal realities at work which is a situation accepted by implication in article 311(1) of UNCLOS,[466] as discussed in chapter five. One 'reality' is UNCLOS, the other the 1958 Geneva Convention. The latter still constitutes the main treaty law in the field of the law of the sea for some non-parties such as the US and Venezuela. Whether this is an issue that will in future cause turbulence in the international community is uncertain. It depends on whether non-parties join and whether they engage in further actions to establish their outer continental shelf without any regard for the CLCS procedure.

3.5.3. What does 'on the basis' mean?

Two proposals were introduced at the third session of the Third Conference in 1975, one from USA and the other from the informal group of juridical experts, commonly

[463] Zinchenko (n 299) 247-8 fn. 21.
[464] McDorman, 'The Outer Continental Shelf in the Arctic Ocean' (n 273) 505.
[465] Ibid, fn. 31. Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles (adopted June 9, 2000; entered into force 17 January 2001) 2143 UNTS 417 (2000 USA-Mexico Agreement). The treaty is discussed in chapter 5.5.2.
[466] Article 311(1) provides: 'This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.'

known as the Evensen group,[467] regarding a Continental Shelf Boundary Commission. If these proposals had been accepted and included in UNCLOS the CLCS would have been a more powerful body. Para. 5 of the US proposal provided that:

> Every delineation pursuant to this Article shall be submitted to the Continental Shelf Boundary Commission for review in accordance with Annex. . . . Acceptance by the Commission of a delineation so submitted, or the final *decision* of the Commission in accordance with Annex . . . and the seaward boundary so fixed, shall be final and binding.[468]

The Evensen group proposal was in many ways similar to that of the US but was more open with regard to interested third States and the Authority. Para. 5 of the proposal reads:

> The coastal State, any State with a particular interest in the matter, or the International Authority, may submit any delineation pursuant to paragraph 4 of this article to the Continental Shelf Boundary Commission for review in accordance with Annex. . . The *decision* of the Commission on a delineation so submitted shall be final and binding.[469]

The Soviet Union submitted a proposal at the eighth session of the Third Conference in 1979 which stated that:

> The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State *taking into account these recommendations* shall be final and *unalterable*.[470]

Reacting to the Soviet proposal, Singapore, advocated a more powerful commission and proposed 'that the limits of the shelf established by a coastal State should be "in accordance with" … the recommendations of the Commission, although the coastal State could deviate from those recommendations in consultation with, and with the consent of, the Commission'.[471]

At the resumed ninth session of the conference in 1979, the Federal Republic of Germany introduced a similar proposal to that of the US delegation and the Evensen group in 1975 which 'would have strengthened the role of the Commission by making its "decisions" on the limits of the continental shelf final and binding'.[472] At the eleventh session the UK proposed that the words 'on the basis of' be changed

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[467] So named after its Norwegian chairman Jens Evensen.
[468] Nandan & Rosenne vol. II (n 106) 849 (emphasis added).
[469] Ibid 850 (emphasis addded). A footnote appended to the paragraph stated: 'It is assumed that the Continental Shelf Boundary Commission is an independent organ, and that its composition would ensure that it dispose of the necessary technical and scientific expertise.' Ibid.
[470] Ibid 862 (emphasis added).
[471] Ibid 868.
[472] Ibid 872; See also ibid 1013.

to ‘taking into account’, as the Soviet Union had proposed in 1979. The UK proposal was unsuccessful.[473]

The wording ‘on the basis of the commission’s recommendation’ was heavily criticised by Canada, first and foremost because it believed it to erode ‘the sovereign rights of coastal States which have unmistakably been recognized’ by article 76.[474] Moreover, Canada argued:

> The commission is primarily an instrument which will provide the international community with reassurances that coastal States will establish their continental shelf limits in strict accordance with the provisions of article 76. It has never been intended, nor should it be intended, as a means to impose on coastal States limits that differ from those already recognized in article 76. Thus to suggest that the coastal States limits shall be established ‘on the basis’ of the commission’s recommendations rather than on the basis of article 76, could be interpreted as giving the commission the function and power to determine the outer limits of the continental shelf of the coastal State.[475]

The wording ‘on the basis of’ seems to imply a closer relationship between the delineation of the outer limits of the continental shelf and the recommendations of the CLCS than the wording ‘taking into account’.[476] The wording ‘provides certainty and consistency for the international community, while preserving sufficient, although unspecified, flexibility for the coastal State’.[477] Within this framework deviations seem to be permissible from the recommendations of the Commission, so long as the coastal State honours its obligations under article 76. This assumption is first and foremost based on the view that ‘[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources’[478] and has also a full sovereign right to delineate the outer limits in accordance with the relevant provisions of article 76. Furthermore, there is nothing in UNCLOS that provides that the coastal State must fully comply with the recommendations of the CLCS. The Convention merely States that ‘the limits of the shelf established by a coastal State *on the basis* of these recommendations shall be final and binding’.[479]

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[473] Ibid 873.
[474] Ibid 1013.
[475] Ibid. Nelson has stated that ‘[t]he Canadian statement seems … to disregard a significant function (though unexpressed) of the Commission – to interpret and apply the provisions of Article 76’. Nelson, ‘The Continental Shelf’ (n 254) 1240, fn. 13.
[476] McDorman, ‘The Role of the Commission on the Limits of the Continental Shelf’ (n 341) 314.
[477] Smith & Taft (n 123) 20.
[478] Article 77(1) of UNCLOS.
[479] Ibid article 76(8) (emphasis added).

An important, unanswered question is how much difference there can be between recommendations of the CLCS and the limits of the outer continental shelf subsequently established by the coastal State. Presumably the difference cannot be too great considering that the wording used is 'on the basis of'. UNCLOS is, however, silent on who has the authority to decide whether the outer limits are based on the Commission's recommendations. It is clear that the CLCS cannot indicate whether a coastal State has established the outer continental shelf on the basis of those recommendations. Other States can do so,[480] however, as will be discussed in chapter four.

It has been pointed out that reference can be made to the interpretation of the wording 'as a basis of' given by the WTO Appellate Body in the *EC Sardines Case*.[481] Using the definition of 'basis' in The New Shorter Oxford English Dictionary on Historical Principles, the Appellate Body concluded that 'there must be a very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other'.[482] Furthermore, 'it can certainly be said – at very least – that something cannot be considered a "basis" for something else if the two are *contradictory*'.[483] This means that should this interpretation be used in the context of the establishment of the outer continental shelf, in order for outer limit lines to be considered established on the basis of the CLCS's recommendations, there must be a very strong and very close relationship between the recommendations of the CLCS and the established outer lines of the coastal State.

The consequences for establishing an outer continental shelf otherwise than on the basis of the CLCS' recommendations are not detailed in article 76(8). Eiriksson is of the opinion that 'if the State does not follow the Commission's

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[480] 2004 ILA Report (n 71) 803.

[481] Suarez (n 23) 211-2. WTO, *European Communities – Report of the Appellate Body, European Communities – Trade Description of Sardines AB-2002-3*, (26 September 2002) WT/DS231/AB/R (*Sardines Case*). The dispute arose over article 2.4 of the Agreement on Technical Barriers to Trade: see Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (adopted on 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120. The provision holds that:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as *a basis for* their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems (emphasis added).

[482] *Sardines Case* (n 481) 69, para. 245.

[483] Ibid para. 248.

recommendations to the letter, that is, as long as there is any doubt on this, article 76, paragraph 8, will not result in a final unopposable determination for the State concerned'.[484] It will be for third States to recognise the established outer continental shelf. Delineation lines not based on the CLCS' recommendations are unlikely to be recognised as final and binding and are likely to be liable to challenge before an international court or tribunal.

3.5.4. What does 'final and binding' mean?

According to the wording of article 76(8) 'the limits of the shelf established by a coastal State on the basis of' the CLCS's recommendations 'shall be *final and binding*'. It has been noted that '[t]he term "final and binding" actually consists of two separate terms, each of which has a separate meaning. The reference to "final" entails that the outer limit line shall no longer be subject to change but becomes permanently fixed.'[485] Meanwhile '[t]he reference to "binding" implies an obligation to accept the outer limit line concerned'.[486] For the established outer limits to be considered final and binding, it is clear that they must be based on the CLCS's recommendations. However, the CLCS neither possesses the competence to interpret the meaning of the words 'final and binding'[487] nor enforce its recommendations. The ILA Committee has stated that:

> The recommendations of the Commission upon a submission by a coastal State are not decisions which are binding upon that State or any other State party to the Convention. Only the coastal State is competent to decide what follow-up it will give to the recommendations of the Commission and to establish the outer limits of its continental shelf.[488]

Moreover:

> One consequence of the reference to 'final and binding' for other States parties to the Convention is that they can no longer challenge an outer limit line that has become final and binding, even if the parameters on which it is based, such as the baseline, changes. This conclusion follows from the fact that the outer limit line becomes final and binding on the coastal State. Only the coastal State is competent to establish the outer limit of its continental shelf and it would thus be impossible that an outer limit line that is final and binding on the coastal State can still be changed and not be binding on other States.[489]

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[484] Eiriksson, 'The Case of Disagreement between a Coastal State and the CLCS' (n 293) 256.
[485] 2004 ILA Report (n 71) 805.
[486] Ibid.
[487] See Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles' (n 296) 119.
[488] 2004 ILA Report (n 71) 786. The Committee notes that '[t]his indicates that, also in cases in which the coastal State has established the limits of its outer continental shelf on the basis of the recommendations of the Commission, it is the coastal State which is responsible for the interpretation and application of the relevant provisions of article 76'. Ibid.
[489] Ibid 805.

According to article 76(9) '[t]he coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf'.[490] The words 'permanently describing the outer limits of its continental shelf' imply that it is impossible for the coastal State to alter the outer limits of the continental shelf when they have been established except when 'another State has successfully challenged the outer limit lines established by the coastal State'.[491] If paras. 8 and 9 of article 76 are interpreted contextually the conclusion must be that the wording 'final and binding' implies that the established outer limits are not alterable and are supposed to have perpetual effect so long as 'the limits are submitted to the Secretary-General and publicity given thereto, following a reasonable time period no protest or objection is registered'.[492] Regarding the role of the Secretary-General in this process McDorman notes:

> [Article 76(9)] does not require that the submitted material or outer limit location be that on which there is accord signified by the Commission. The Secretary-General has no independent authority to review or evaluate the information provided by the submitting state. Acceptance by the Secretary-General of submitted material does not mean that the outer limit established in the material is binding on other states. Article 76(9) must be treated as placing upon the Secretary-General a responsibility similar to that of a treaty depositary,[493] which means that the Secretary-General will accept all submitted materials with no legal consequences attaching to such acceptance.[494]

Article 76(8) is not clear on who is bound by a coastal State's establishment of its outer continental shelf. Various interpretations exist. The US Government has interpreted the words final and binding as following: 'If the coastal State agrees, the limits of the continental shelf established by the coastal State on the basis of these recommendations are final and binding (article 76(8)), thus providing stability to these claims which may not be contested.'[495] Other authors believe that the

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[490] Rule 54(3) of the Rules of Procedure add to this that 'the Secretary-General shall also give due publicity to the recommendations of the Commission which in the view of the Commission are related to those limits'. Mexico was the first state to submit such information for the Western Polygon in the Gulf of Mexico on 20 May 2009. See A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the United Mexican States pursuant to Part VI of and Annex II to the United Nations Convention on the Law of the sea; Executive summary (19 December 2011) 5.

[491] 2004 ILA Report (n 71) 807.

[492] McDorman, 'The Role of the Commission on the Limits of the Continental Shelf' (n 341) 316-7.

[493] Article 76(2) of the VCLT provides that: 'The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.'

[494] McDorman, 'The Role of the Commission on the Limits of the Continental Shelf' (n 341) 316.

[495] *Commentary – The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI*, attached to the Letter of Submittal from the US Secretary of State to the

established limit becomes *erga omnes*.[496] According to this view not only the submitting state but also other States are bound even although they are not parties to UNCLOS. The ILA Committee has however stated that the outer limit line cannot become 'final and binding' on non-parties 'by operation of article 76(8) as a consequence of the *pacta tertiis* rule'.[497] McDorman has argued convincingly that:

> [Final and binding] refers only to the submitting state in that the submitting state, having delineated its outer limit of the continental shelf *and that limit not being challenged by other states*, cannot subsequently change the location of its outer limit. To this extent, and this extent only, would the outer limit be 'final and binding', not to be contestable and perhaps become an obligation *erga omnes*.[498]

In the case law of the Iran-United States Claims Tribunal the term, 'final and binding' is explained in the context of article IV(1) of the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), from 19 January 1981.[499] The provision reads: 'All decisions and awards of the Tribunal shall be final and binding on the parties.' The Tribunal has stated that:

> The terms 'final' and 'binding', when used in instruments relating to international arbitration, do not ordinarily mean that an award is self-enforcing. Rather, as is generally recognized, a 'final' and 'binding' award is one with which the parties must comply and which is ripe for enforcement.[500]

Although article 76(8) of UNCLOS does not indicate who is bound by the outcome of the process, as the Algiers Declaration does, it seems safe to deduce from the statement of the Tribunal that the final and binding nature of the recommendations of the CLCS is not the same as the nature of awards since they are not 'ripe for

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US President, part of the Message of Transmittal of the Law of the Sea Convention from the US President to the US Congress, US Senate, Treaty Doc. 103-39, 103rd Congress, 2nd Session, 1994, 57.

[496] L.D.M. Nelson, 'The Settlement of Disputes Arising from Conflicting Outer Continental Shelf Claims' (n 392) 418-9. *Erga omnes* obligations are obligations 'of a State towards the international community as a whole ... By their very nature ... [they] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection'. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Judgement) (Second Phase) [1970] ICJ Rep. 3, 32, para. 33.

[497] 2004 ILA Report (n 71) 804. Article 34 of the VCLT provides that '[a] treaty does not create either obligations or rights for a third State without its consent'.

[498] McDorman, 'The Role of the Commission on the Limits of the Continental Shelf' (n 340) 315; See also McDorman, 'The Outer Continental Shelf in the Arctic Ocean' (n 273) 510.

[499] (Adopted 19 January 1981) 20 ILM 230. Often called the Algiers Declaration.

[500] *Decision in Iran v. United States Case Concerning Interpretation of Algiers Declarations with respect to whether U.S. is obliged to satisfy promptly any Award rendered in favor of Iran against U.S. Nationals* (Iran-United States Claims Tribunal) (1987) 26 ILM 1592, 1597.

enforcement'. This is a clear example of the difference between recommendations of CLCS and judgements and awards of international courts and tribunals.

It must be borne in mind that the terms 'final and binding' and 'on the basis' are interlinked. If the outer limits are not established on the basis of the Commission's recommendations, they are unlikely to be viewed as final and binding by third States and are a target for challenge by third States before international courts and tribunals. It must therefore be in the best interests for a state to make a good and proper submission and follow the recommendations of the CLCS so long as they are acceptable from a scientific, technical and legal perspective.

3.6. The CLCS, Maritime Boundary Delimitations and unresolved Land and Maritime Disputes

3.6.1. What is not the Role of the CLCS

As previously explained, the text of UNCLOS attempts to create a firewall between the delineation and delimitation process of the outer continental shelf. Article 76(10) states that the provisions of the 'article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts'. The Virginia Commentary explains that 'paragraph 10 is a saving provision for all questions regarding the delimitation of overlapping claims between States to continental shelf' and that the 'provision emphasizes that article 76 prescribes the method of determining the outer limits of the continental shelf'.[501] On the other hand, 'it does not address in any way the question of delimitation of the continental shelf between opposite or adjacent States, which is addressed exclusively in article 83'.[502] Similarly, the ILA Committee observes that '[a]rticle 76(10) guarantees that the implementation of article 76 by one State does not affect the rights of another State, in a case where the delimitation of the continental shelf between the States concerned is at issue'.[503] Moreover, the Committee notes that the 'clause suggests that the existence of overlapping claims to a continental shelf area should not be invoked by a State to argue that the CLCS should not consider a submission in respect of the

[501] Nandan & Rosenne vol. II (n 106) 883.
[502] Ibid.
[503] 2004 ILA Report (n 71) 810.

outer limits of such an area'.[504] This is what is done in practice, as will be discussed below.

The distinction between delineation and delimitation is reinforced by article 9 of Annex II and article 134(4) of UNCLOS. Article 9 of Annex II declares that '[t]he actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts'. According to the Virginia Commentary, the article is a saving provision, as article 76(10), focusing on the role of the Commission.[505] In addition, the Commentary states that:

> The phrase 'matters relating to delimitation of boundaries' emphasizes that the Commission is not to function in determining, or to influence negotiations on, the continental shelf boundary between States with overlapping claims … It also indicates that the Commission is not to be involved in any matters regarding the determination of the outer limits of a coastal State's continental shelf where there is a dispute with another State over that limit. *The Commission's role is to make recommendations on the outer limits of a coastal State's continental shelf, not to be involved in matters relating to delimitation of the continental shelf between States.*[506]

Article 134(4) provides that nothing in Part XI of the Convention affects 'the validity of agreements relating to delimitation between States with opposite or adjacent coasts'. Importantly, it was explained by ITLOS in the *Bay of Bengal Case* that:

> Just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.[507]

In other words, the Tribunal is stating that the delimitation process should not have an impact on the Commission's role of delineating the outer limits of the continental shelf. This is an elaboration of the 'non-prejudice provisions'.

The 'non-prejudice provisions' are further developed in the Rules of Procedure of the Commission and Annex I to the Rules which is entitled: 'Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes.' Rule 46 provides that:

> 1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.

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[504] Ibid.
[505] Nandan & Rosenne vol. II (n 106) 1017.
[506] Ibid (emphasis added). Wolfrum argues that it is definitely a flaw in the procedure that the Commission cannot in this context challenge or initiate a legal action under Part XV of the Convention. Wolfrum (n 239) 25.
[507] *Bay of Bengal Case* (n 4) 112, para. 379

> 2. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States.

Annex I to the Rules was adopted 'in an attempt to balance, on the one hand, the interest in allowing the Commission to carry out its delineation work with, on the other hand, the interest in avoiding prejudice to Parties involved in unresolved disputes'.[508] It must be highlighted that although unresolved land and maritime disputes are not mentioned in article 76(10) and article 9 of Annex II to UNCLOS they are treated in the same manner as delimitation disputes in Annex I of the Rules of Procedure, as will be discussed below.

Para. 1 of Annex I states that '[t]he Commission recognizes that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States'. Article 76(10) and article 9 of Annex II to UNCLOS are incorporated and elaborated by para. 5 of the Annex which provides that:

> a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.
>
> b) The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or maritime dispute.

It has been noted that '[t]he practical result of this provision is that States are in a position to block Commission consideration of their neighbors' submissions'.[509] This means that land and maritime disputes should not be considered by the CLCS without explicit approval from the relevant third State. Examples of blocked submissions are the joint submission of Vietnam and Malaysia and the partial submission of Vietnam blocked by China and the Philippines. China blocked the submission due to a sovereignty dispute over islands in the South China Sea,[510] in particular Spratley Island. The Philippines' reason for blocking the submission is not only because the claims overlap with those of its owns but also because of the 'controversy arising from the territorial claims on some of the islands in the area

[508] Lathrop (n 17) 4145.
[509] Ibid.
[510] *Note Verbale of the Permanent Mission of the People's Republic of China to the United Nations* (7 May 2009) Doc. CML/17/2009; *Note Verbale of the Permanent Mission of the People's Republic of China to the United Nations* (14 April 2011) Doc. CML/8/2011; *Note Verbale of the Permanent Mission of the People's Republic of China to the United Nations* (7 May 2009) Doc. CML/18/2009.

including North Borneo'.[511] South Korea and China blocked a part of the submission of Japan. The reason for blocking in this case was Japan's usage of Oki-no-Tori Shima as a basepoint. Japan is of the opinion that Oki-no-Tori Shima is an island whilst South Korea and China argue that it is in fact a rock and point out that article 121(3) of UNCLOS clearly provides that '[r]ocks which cannot sustain human habitation or economic life of their own shall have no [EEZ] or continental shelf'.[512] A further example of a blocked submission is the UK's partial submission regarding the Falkland Islands and of South Georgia and the South Sandwich Islands. Argentina has blocked the submission because it claims that islands to be Argentinean territory, not British.[513] This is an extreme situation.

Articles 76(10), 134(4) and 9 of Annex II of UNCLOS and para. 5 of Annex I to the Rules of Procedure emphasise that it is the responsibility of coastal States themselves to delimit their outer continental shelves. They have exclusive competence to do so. This in fact applies to all boundary delimitations, as noted in the Encyclopedia of Public International Law:

> The actual course of a boundary is a matter to be determined by the two adjacent States, a question subject to the exclusive competence of the two States. Other States cannot but accept what these two States decide ... In this sense, the two adjacent States create an objective situation which is valid *erga omnes*. If other States expressly recognize such a situation, the function of such recognition is political rather than legal.[514]

To prevent the CLCS from overstepping its mandate, the Rules of Procedure provide that '[t]he Commission may request a State making a submission to cooperate with it in order not to prejudice matters relating to the delimitation of boundaries between

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[511] *Note Verbale of the Permanent Mission of the Republic of the Philippines to the United Nations* (4 August 2009) Doc. 000819; *Note Verbale of the Permanent Mission of the Republic of the Philippines to the United Nations* (5 April 2011) Doc. 000228.

[512] See China's reactions to Japan (n 279); *Note Verbale of the Permanent Mission of the Republic of Korea to the United Nations* (27 February 2009) Doc. MUN/046/09; *Note Verbale of the Permanent Mission of the People's Republic of China to the United Nations* (3 August 2011) Doc. CML/59/2011; *Note Verbale of the Permanent Mission of the Republic of Korea to the United Nations* (11 August 2011) Doc. MUN/230/11. The CLCS has acknowledged 'that it has no role on matters relating to the legal interpretation of article 121 of the Convention'. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, Twenty-third session, Doc. CLCS/62 (20 April 2009) 12, para. 59. The Commission decided not to take actions in the area were Oki-no-Tori-Shima is located until the controversies concerning its legal status has been resolved. See Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Partial Submission made by Japan on 12 November 2008 (19 April 2012) 5, para. 20.

[513] *Note Verbale of the Permanent Mission of the Republic of Argentine* (20 August 2009) Doc. N.U. No. 290/09/600.

[514] Michael Bothe, 'Boundaries', *Encyclopedia of Public International Law*, vol. 1 (Rudolf Bernhardt ed, 1992) 443, 448; See also Boyle & Chinkin (n 229) 239.

opposite or adjacent States'.[515] Moreover, in the case of delimitation disputes or in other cases of unresolved land or maritime disputes relating to a coastal State's submission, the Rules of Procedure provide that the Commission shall be '[i]nformed of such disputes by the coastal States making the submission; and ... [a]ssured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States'.[516]

Although UNCLOS does not mention the possibility of making a submission where there is a delimitation dispute between neighbouring States, two paragraphs of the Rules of Procedure provide how States involved in land or maritime disputes can make a submission to the CLCS without infringing the basic rule on non-involvement of the CLCS in boundary delimitations. These two paragraphs introduce the possibility of making partial, separate or joint submissions.[517] It is obvious, however, that the CLCS cannot, due to the provisions discussed above, make recommendations regarding the outer limits of the shelf unless and until delimitation disputes affecting the submitting party have been resolved, or all the disputing States have indicated their non-objection to the Commission proceeding.

3.6.2. What is a Dispute?

There is no definition of the term dispute either in UNCLOS or the Rules of Procedure. The definition must instead be sought in the jurisprudence of international courts and tribunals. The PCIJ in the 1924 *Mavrommatis Palestine Concessions Case* stated famously that: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.'[518] In the *South West Africa Case* the ICJ added: 'It must be shown that the claim of one party is positively opposed by the other.'[519] Oude Elferink notes that this indicates 'that land and maritime disputes in the sense of Annex I to the Rules of Procedure also include conflicts of legal views over the provisions contained in article 76 or other articles of the Convention if they have an impact on the establishment of the outer limit of the continental

[515] Para. 6 of Annex I to the Rules of Procedure.
[516] Ibid para. 2.
[517] Ibid paras. 3-4.
[518] *Mavrommatis Palestine Concession (Greece v. UK)* (Judgement) [1924] PCIJ Rep. Series A No.2, 5, 11.
[519] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Preliminary Objections) [1962] ICJ Rep. 319, 328.

shelf'.[520] The Chairman of the CLCS pointed out in 1998 that Annex I 'dealt with the complex issue of how the Commission should treat possible submissions containing areas under actual or *potential* delimitation dispute'.[521] This shows that the CLCS has adopted a more cautious understanding than the Court of the term dispute.[522]

In the Advisory Opinion of the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the ICJ held that '[w]hether there exists an international dispute is a matter for objective determination [by the Court]. The mere denial of the existence of a dispute does not prove its non-existence.'[523] This principle is reflected in article 288(4) of UNCLOS. The ILA Committee noted that Annex I 'does not indicate how the CLCS will proceed when States differ over the question whether a dispute in relation to a submission exists'.[524] The Committee argues that '[i]t would seem that the Commission in principle should include all areas for which there *prima facie* appears to be a dispute in the sense of Annex I in the area in dispute for the purposes of the Annex'.[525] Oude Elferink notes that '[i]t is not likely that the CLCS, which is not a court of law and which has the task of making recommendations concerning the outer limits of the continental shelf and not settling disputes related to these limits, can or will adopt a similar approach'.[526] Moreover, he notes that:

> Annex I to the Rules of Procedure recognizes that the competence with respect to such disputes rests with States. This suggests that the CLCS will not characterize the real dispute between the States involved. At the same time, the rules adopted by the CLCS indicate that it will make an independent evaluation of the existence of a dispute.[527]

It must be underlined that it is the task of the subcommissions established to assess each and every recommendation including to evaluate 'all information regarding any

[520] Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' (n 398) 266; See also 2004 ILA Report (n 71) 783, fn. 47.
[521] CLCS/7 (n 352) 2, para. 5 (emphasis added).
[522] See Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' (n 398) 266.
[523] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) (First Phase) [1950] ICJ Rep. 65, 74.
[524] 2004 ILA Report (n 71) 813.
[525] Ibid.
[526] Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' (n 398) 266.
[527] Ibid.

disputes related to the submission, in accordance with rule 46' and, if it deems necessary, 'take action based on the procedures in annex I to these Rules'.[528]

Serdy has criticised the CLCS for showing counterproductive oversensitivity to disputes and for seriously misunderstanding the non-prejudice clauses in UNCLOS.[529] He argues that para. 5(a) of Annex I to the Rules of Procedure is not in conformity with article 76(10) and article 9 of Annex II to UNCLOS since 'these refer only to delimitation, not to disputes, and the two concepts are far from synonymous'.[530] Serdy highlights that the second sentence of article 76(8) is mandatory in nature: 'The Commission shall make recommendations to coastal States'. He points out that the wording 'entitles the submitting State to expect that its submission will be examined on its technical merits'.[531] Moreover, he argues that '[t]here is no provision other than the tendentious reading given to the non-prejudice clauses that would justify the CLCS refusing, as it has, to carry out the very task that the LOSC brought it into being to perform and has assigned to'.[532] As a counter argument, it can be noted that the Rules of Procedure were accepted at the Meeting of States Parties and could be seen as an amendment by agreement by the Parties in the terms of the VCLT.[533] It can also be pointed out that the CLCS is not a suitable forum for resolving sensitive disputes regarding territory and maritime space as the Commission is a scientific and technical body, not a court of law. It is thus not as clear cut as concluding, as does Serdy, that the CLCS is conducting itself counterproductively.

3.6.3. Third Parties

UNCLOS is silent about the rights of third parties in the CLCS procedure and little is said about their rights in the Rules of Procedure. Rules 50 and 51(1) contain important provisions for third States.[534] Rule 50 provides that:

> The Secretary-General shall, through the appropriate channels, promptly notify the Commission and all States Members of the United Nations, including States Parties to the Convention, of the receipt of the submission, and make public the executive summary including all charts and

[528] Para. 7 of Annex III to the Rules of Procedure.
[529] Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 362-7.
[530] Ibid 362.
[531] Ibid 366.
[532] Ibid.
[533] See discussion in chapter 3.3.5.2.
[534] These rules are developed in detail in paras. 2 & 7 of Annex III to the Rules of Procedure.

> coordinates referred to in paragraph 9.1.4 of the Guidelines and contained in that summary, upon completion of the translation of the executive summary referred to in rule 47, paragraph 3.

The executive summary includes information which should be adequate for other States seeking to locate their claimed outer limits, the basis for their respective claims and whether it involves areas they also claim or are going to claim. Para. 9.1.4 of the Guidelines provide that the executive summary will contain information on four specific issues:

> a) Charts at an appopriate scale and coordinates indicating the outer limits of the continental shelf and the relevant territorial sea baselines;
> b) Which provisions of article 76 are invoked to support the submission;
> c) The names of any Commission members who gave advice in the preparation of the submission; and
> d) Any disputes as referred to in rule 44 [rule 46 after amendments] and annex I to the Rules of Procedure of the Commission.

Rule 51(1) provides that:

> Upon receipt of a submission by the Secretary-General, the consideration of that submission shall be included in the provisional agenda of the next ordinary session of the Commission ... provided that that session ... is held not *earlier than three months* after the date of the publication by the Secretary-General of the executive summary including all charts and coordinates referred to in rule 50 (emphasis added).

Although the rules do not state so explicitly, the three month waiting time seems to indicate that third States can review and respond to the information published in the executive summaries.[535] Other States can respond to a submission by written communication with the CLCS through the Secretary-General in the period between the latter notification of receipt of a submission and the consideration thereof by the CLCS.[536] A State representative, when representing a submission to the CLCS, shall comment 'on any note verbale from other States regarding the data reflected in the executive summary'.[537] This means that States must respond to the input of third parties before the CLCS, and demonstrate that the voices of third parties are not ignored in the process.

[535] The summary flowchart of the procedures concerning a submission made to the Commission, published in chapter VII of Annex III to the Rules of the Procedure, supports this understanding.
[536] The CLCS took the decision not to consider a letter from the US regarding sediment thickness and the Vitoria-Trinidade feature in the Brazilian submission because '[o]nly in the case of a dispute between states with opposite or adjacent coasts or in other cases of unresolved land or maritime would the Commission be required to consider communications from States other than the submitting one'. CLCS/42 (n 259) 3-4, para. 17; See also CLCS/44 (n 262) 4, para. 17.
[537] Para 2(a)(v) of Annex III to the Rules of Procedure. Third parties are not, however, given the right of making a statement to the CLCS.

The majority of submissions have provoked written communications. Lathrop has regarded there to be three categories of responses: '(1) communications expressing concerns about the scientific or technical basis of the outer limit, (2) communications expressing concerns related to undermining Article 4 of the Antarctic Treaty, and (3) communications related to unresolved disputes'.[538] The latter category is also the largest. In communications regarding unresolved disputes, Lathrop notes that States have either '(1) expressly consented to the Commission's consideration of the submission, notwithstanding the unresolved dispute, (2) reserved their position without giving express consent, or (3) expressly objected to Commission consideration of the submission'.[539] It can be argued that the CLCS has become a kind of land and maritime 'dispute highlighter' and has played a central role in crystallising the main aspects of various disputes.

3.6.4. Partial Submissions

The possibility of making a partial submission is made available by para. 3 of Annex I of the Rules of Procedure. It reads:

> A submission may be made by a coastal State for a portion of its continental shelf in order not to prejudice questions relating to the delimitation of boundaries between States in any other portion or portions of the continental shelf for which a submission may be made later, notwithstanding the provisions regarding the ten-year period established by article 4 of Annex II to the Convention.

More than half of the submissions made so far – 31 out of 61 – are partial. This may come as a surprise since some authors were sceptical of the usefulness of this type of submission.[540] Partial submissions are principally made to avoid disputed areas without making it impossible for States to delineate undisputed areas. This intention is clearly stated in the Philippine's submission:

> As a gesture of good faith, the Philippines makes this partial submission in order to avoid creating or provoking maritime boundary disputes where there are none, or exacerbating them where they may exist, in areas where maritime boundaries have not yet been delimited between opposite or adjacent coastal States. This is to build confidence and promote international cooperation in the peaceful and amicable resolution of maritime boundary issues. It does not in any manner prejudice the position of any coastal State.[541]

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[538] Lathrop (n 17) 4146.
[539] Ibid.
[540] Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' (n 398) 276.
[541] A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea; Executive Summary (8 April 2009) 11; see also Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the

It has been pointed out that '[t]he idea of a partial submission covering only the dispute-free portion of the outer limits is that potential third states will refrain from disturbing the consideration by the CLCS and that this may help speed up the CLCS recommendation process'.[542] When a partial submission is made, some consideration has to be given to the portions of the continental shelf that will be excluded from the submission but claimed in future submissions. This is a difficult task that often involves tactical and political considerations.

The advantage of a partial submission is that it requires 'only minimal communication or coordination with neighbors: only enough to ascertain the spatial extent of their claims in the area under consideration'.[543] However, 'to copper-fasten the validity of the submission and to assist the CLCS in its deliberations, it may be desirable from a fail-safe point of view ... to agree clearly in advance with all possible neigboring claimants just what seabed areas will be subject to the partial submission'.[544] The disadvantage of a partial submission 'may be that the very fact of inclusion of a particular area in such a partial submission may put the international spotlight on such an area, leading to a sudden concentration of attention from neighboring states and a potential scramble for seabed rights there'.[545] Another possible disadvantage is the temptation that, 'by opting for a partial submission, the submitting state is hoping to disguise the true extent of a dispute situation'.[546] Symmons argues that Ireland disguised the true extent of a dispute situation with Iceland and Denmark (the Faroe Islands) in its partial submission regarding the area abutting the Porcupine Abyssal.[547] In some circumstances partial submissions could, 'depending on the domestic climate, be politically unpalatable if it appears to leave

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Law of the Sea 1982 in respect of the area abutting the Porcupine Abyssal Plain: Executive Summary (25 May 2005) 4.

[542] Michael Gau, 'Third Party Intervention in the Commission on the Limits of the Continental Shelf Regarding a Submission Involving a Dispute' (2009) 40 ODIL 61, 65.

[543] Lathrop (n 17) 4152.

[544] Clive Symmons, 'The Irish Partial Submission to the Commission on the Limits of the Continental Shelf in 2005: A Precedent for Future Such Submission in the Light of the "Disputed Areas" Procedures of the Commission?' (2006) 37 ODIL 299, 310.

[545] Ibid.

[546] Ibid 309.

[547] Ibid.

the submitting State open to criticism by neighbors in future negotiations or other proceedings'.[548]

Partial submissions are not only used to avoid areas of dispute, but also for other purposes. Some '[s]tates with several, non-contiguous parcels of territory, such as France, the United Kingdom, and South Africa, have made multiple, partial submissions for different parcels of territory'.[549] In other instances 'partial submissions have been necessary where preparation for a complete submission has not been politically or technically possible by the submission deadline'.[550]

Resubmissions made under article 8 of Annex II to UNCLOS can also be partial. This is envisaged in the Commission's recommendations to the Russian submission regarding the part of the Sea of Okhotsk where 'the Commission recommended to the Russian Federation to make a well-documented partial submission for its extended continental shelf in the northern part of that sea'.[551]

It is clear from the wording of para 3. of Annex I to the Rules of Procedure that 'a submission for the areas not included in the initial submission may be made after the 10-year limit specified in article 4 of Annex II to the LOS Convention',[552] i.e. after 13 May 2009, as discussed above. Nevertheless, as noted, a 'State would be expected to make such submission in good faith within a reasonable time'.[553] What constitutes a reasonable period of time in this context must vary with the circumstances of each case. It must also be stressed that para. 3 of the Rules of Procedure does not provide that States must submit the remainder of their claims together. The provision makes references to 'portion or portions of the continental shelf for which a submission may be made later'. States can consequently make several partial submissions for different areas at different times.

3.6.5. Joint and Separate Submissions

Para. 4 of Annex I to the Rules of Procedure introduces the possibility for States to make a joint or separate submission to the CLCS. It reads:

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[548] Lathrop (n 17) 4152.
[549] Ibid 4151, fn. 44.
[550] Ibid.
[551] Oceans & LOS 2002 Report (n 398) 9, para. 40.
[552] Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' (n 398) 267.
[553] Egede Edwin, 'Submission of Brazil and Article 76 of the Law of the Sea Convention (LOSC) 1982' (2006) 21 IJMCL 33, 38.

> Joint or separate submissions to the Commission requesting the Commission to make recommendations with respect to delineation may be made by two or more coastal States by agreement:
>
> (a) Without regard to the delimitation of boundaries between those States; or
> (b) With an indication, by means of geodetic coordinates, of the extent to which a submission is without prejudice to the matters relating to the delimitation of boundaries with another or other States Parties to this Agreement.

The paragraph provides for two different types of submissions, joint or separate. It is important to notice that under the provision all concerned States are required to agree on the approach taken in the submission. Oude Elferink notes that 'such agreement may be difficult to attain if these States have different views on the area of overlap of continental shelves or the area of relevance for the delimitation'.[554]

Given the circumstances in each individual case, States can either decide that the submission is without regard to the delimitation of boundaries between them, or adopt an approach that has elements similar to partial submissions. The former approach is more likely to be successful where no other claims exist upon the claimed area. The latter approach is probably more useful where the circumstances are more complex. Under para. 4(b) of Annex I, coastal States must choose which areas they are going to exclude due to a dispute with a State not taking part in the submission. A factor underlying the provisions is that 'the CLCS needs to be assured by all the submitting states of a joint or separate submission that none of them is going to lodge a Notification indicating the existence of a dispute involved in the submissions'.[555]

3.6.5.1. Joint Submissions

Thus far, five of the existing 61 submissions have been joint submissions. Two of these have been accepted by the CLCS, the remainder still awaiting consideration. All joint submissions have been partial in extent. The spokesperson for the first joint submission (made by France, Ireland, Spain and the UK)[556] stated that:

> [A]ll four coastal States could have made potentially overlapping, separate submissions. However, they considered it more appropriate to avail themselves of the possibility of making a joint submission since, upon the issuance of recommendations by the Commission, the four coastal

[554] Oude Elferink, 'Submissions of Coastal States to the CLCS in cases of Unresolved Land or Maritime Disputes' (n 398) 267-8.
[555] Gau, 'Third Party Intervention in the CLCS' (n 542) 65-6.
[556] France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland, Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the area of the Celtic Sea and the Bay of Biscay (19 May 2006).

> States would be able to establish the outer limit of their continental shelf in the region prior to its delimitation among themselves.[557]

This group of States avoided involving areas that are also claimed by States that were not involved in the submission. Lathrop notes that '[t]he result of this approach is that the four States have moved quickly through the Commission process, ascertained the size and scope of their shared area, and may now set about splitting it up through the usual bilateral processes and at their leisure'.[558]

Joint submissions entail considerable cooperation. It has been pointed out that '[t]here would normally be full disclosure of submission data and materials between the coastal States and the technical team preparing the submission would operate as a single technical team cooperating on all facets of the submission'.[559] Lathrop notes that joint submissions 'will increase some transactions costs, but may result in efficiencies as well' and '[i]n the right circumstances the effort can remove unresolved disputes from the equation'.[560] There are also a few technical advantages in making joint submissions such as pooling of datasets, pooled expertise, division of labour and the gaining of experience and insights for States who have other submissions to make.[561] However, the Chairman of the CLCS stated in September 2007 that henceforth 'in any joint submission, each coastal State has to establish its own criteria for the feet of the continental slope, applied formulas, constraints and respective outer limits'.[562] In other words, 'henceforth each jointly submitting State will be required to show independently what part of the area landward of the jointly submitted outer limit would have fallen within a putative individually submitted limit'.[563] This is not a requirement according to Annex I of the Rules of Procedure. Serdy has noted that '[t]his largely negates the advantage for States of making joint submissions'.[564]

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[557] CLCS/62 (n 512) 4, para. 12.
[558] Lathrop (n 17) 4153.
[559] Alain Murphy, 'Coordinated, Harmonized or Joint Submissions to the Commission on the Limits of the Continental Shelf' (ABLOS Conference, Monaco, 2008) <http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session2-Paper1-Murphy.pdf> accessed 16 July 2012.
[560] Lathrop (n 17) 4154.
[561] Murphy (n 559).
[562] CLCS/56 (n 345) 6, para. 28; See also Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 369-71.
[563] Ibid 370.
[564] Ibid.

It must be emphasised that 'without all necessary Parties a joint submission may ... fail to overcome the obstacle presented by uncooperative neighboring States willing to invoke unresolved disputes to block Commission consideration'.[565] That was exactly what happened with the joint submission by Malaysia and Vietnam, discussed above. If, however, no State expresses objections, a significant amount of time has been spared and the CLCS has been assisted in managing its workload. Moreover, disputes can perhaps be averted or at least crystallised, and a spirit of cooperation and understanding between the parties involved in making the submission can spill over into the delimitation procedure and affect it positively.

3.6.5.2. Separate Submissions

If States do not manage to agree on making a joint submission they can make separate submissions indicating that the submissions should be considered together by the CLCS.[566] Two paths have generally been followed by States in this context.

> The first involves presubmission cooperation that might include data exchange, an exchange of views on extended shelf boundary positions, the beginnings of the negotiation of those boundaries, or securing some form of pre-submission agreement from neighbors not to object. The second approach involves lodging a separate submission that will create areas of overlap but without pre-submission cooperation and despite the lack of 'no objection' agreement.[567]

An exceptional example of the former approach can be found in the trilateral Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between Denmark (the Faroe Islands), Iceland and Norway (Jan Mayen and mainland Norway) in the Southern Part of the Banana Hole of the Northeast Atlantic from 20 September 2006.[568] The Agreed Minutes provisionally delimit the outer continental shelf between the States, who then make separate submissions to the CLCS (which they have done) and thereafter create a binding boundary delimitation agreement. The paragraphs on separate submission read:

> 6. Each State will, when submitting its documentation concerning the outer limits of its continental shelf in the area, request that the Commission consider it and make its recommendations on this basis, without prejudice to the submission of documentation by the other States at a later stage or

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[565] Lathrop (n 17) 4154.
[566] See e.g. Gau, 'Third Party Intervention in the CLCS' (n 542) 65.
[567] Lathrop (n 17) 4154. Lathrop discusses separate submissions in detail in ibid 4154-9.
[568] The Norwegian Ministry for Foreign Affairs, 'Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of the Northeast Atlantic' (Adopted 20 September 2006). <http://www.regjeringen.no/en/dep/ud/documents/Laws-and-rules/retningslinjer/2006/Agreed-Minutes.html?id=446839> accessed 16 July 2012 (the 2006 Faroe Islands, Iceland, Norway Agreed Minutes or Agreed Minutes).

> to delimitation of the continental shelf between the three States. The State concerned will in this connection declare that such a request is agreed between the three States.
>
> 7. When one State submits documentation to the Commission, the other States will notify the Secretary-General of the United Nations in accordance with the Commission's rules of procedure that they do not object to the Commission considering the documentation and making recommendations on this basis, without prejudice to the submission of documentation by these States at a later stage or to the question of bilateral delimitations of the continental shelf between the three States.[569]

This approach has been effective. When a party to the agreed minutes has made a submission the other has submitted 'no objection' notes to the Commission. Although the intellectual approach found in the Agreed Minutes has proved successful, it has not been adopted by other States.

Another example is to be found in the approach taken by some members of the Economic Community of West African States. In a meeting held in February 2009, Benin, Nigeria, Togo, Ghana and the Ivory Coast made the following decision:

> Issues of the limit of adjacent and opposite boundaries shall continue to be discussed in spirit of cooperation to arrive at a definite delimitation even after the presentation of the preliminary information/submission, Member States would therefore write 'no objection note' to the submissions of their neighbouring States.[570]

This approach has been likewise successful. None of the parties to the agreed minutes have objected to the considerations of the CLCS of submissions made by the other parties despite overlapping claims.

An example of failed separate submissions, which were made without the cooperation of a State with overlapping outer continental shelf claims, are those made by Myanmar and India. Bangladesh, which is sandwiched between its two neighbours, objected to the submissions by invoking para. 5(a) of Annex I to the Rules of Procedure and referring to unresolved maritime boundary disputes.[571] So, in fact, did Myanmar with regard to the Bangladeshi submission.[572] Interestingly, India did not object to the consideration by the CLCS of the Bangladeshi submission

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[569] The Agreed Minutes are discussed in more detail in chapter 5.5.2.

[570] 5.2. Minutes of Expert Meeting of ECOWAS Member States on the Outer Limits of the Continental Shelf, Accra, 24-6 February 2009, Appendix A. Quoted in the submission by the Government of the Republic of Ghana for the Establishment of the Outer Limits of the Continental Shelf of Ghana pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea: Executive Summary (28 April 2009) 5, para. 5.2.

[571] *Note Verbale of the Permanent Mission of the Republic of Bangladesh to the Secretary General of the United Nations* (23 July & 29 October 2009) Doc. PMBNY-UNCLOS/2009-.

[572] *Note Verbale of the Permanent Mission of the Republic of the Union of Myanmar to the Secretary General of the United Nations* (31 March 2011) Doc. 146/03 20 17.

although it made some observations regarding it.[573] Because the maritime boundary dispute between Bangladesh and Myanmar has now been resolved, the question arises as to whether the States have to withdraw their objections so the CLCS can continue the delineation process or whether the CLCS can continue the delineation procedure without communicating with the parties to the dispute. The CLCS, very likely with the *Bay of Bengal Case* in mind, stated shortly after the ruling in the case:

> [I]n at least one case, the circumstances which had led to the postponement of the consideration of the submission might no longer exist. However … in order to be able to proceed with the establishment of a subcommission and the consideration of the submission, an official communication from the States concerned would be required.[574]

It must be questioned whether this position is logical given that the cause of the objection no longer exists and because it creates the possibility for a State to block the consideration of a submission, for no valid reason, by not submitting an official communication to the CLCS. Perhaps this shows how strictly CLCS interprets para. 1 of Annex I of the Rules of Procedure, i.e. that 'the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States'.

3.7. Concluding Remarks

At the beginning of the chapter the question was asked as to what is the role of the CLCS in delineations and delimitations of the outer continental shelf. In the delineation procedure the CLCS plays the role of a scientific and technical administrative buffer zone to curtail the territorial temptation of broad margin States and to protect the international seabed area which is beyond the limits of national jurisdiction. Another role is to assist States in the submission procedure. The Commission can be seen as an entity created in the spirit of mixed boundary commissions even if it does not share all the characteristics of such commissions. The CLCS has no formal ties with the two other bodies established by UNCLOS. It must be noted, however, that the activities of the bodies established by UNCLOS are supposed to be complementary. The ties between the CLCS and the Meeting of States Parties have been rather strong and the CLCS has sought the advice of the Meeting to legitimise important decisions. The Commission is comprised of

[573] *Note Verbale of the Permanent Mission of India to the Secretary-General of the United Nations* (20 June 2011) Doc. PM/NY/443/2/2011.
[574] CLCS/74 (n 424) 11-2, para. 59.

individuals and not representatives of States, although the State that nominated a CLCS member covers his expenses. Some of the Commission's recommendations have provoked harsh responses, especially regarding its interpretation of the term natural prolongation. Because ITLOS supported the Commission's interpretation it is unlikely that the responses to this issue will be as strong in the future.

There is no role for the CLCS with regard to delimitation, according to UNCLOS. The non-prejudice clauses of the Convention are absolutely clear on this issue. The Rules of Procedure have expanded the non-prejudice clauses to cases of unresolved land or maritime disputes, such as the dispute between Argentina and the UK concerning the Falkland Islands. This has been criticised even although this development could be seen as an amendment by agreement by the Parties within the meaning of the VCLT. Three methods (joint, separate and partial submissions) that are not described in UNCLOS have been created to allow the Commission to carry out its delineation work without violating the non-prejudice clauses. Partial submissions are the most common type of submissions, comprising more than half of the submissions yet made.

In conclusion, the main role of the CLCS is to stand guard against exaggerated claims to the continental shelf beyond 200 nm and at the same time to protect the territorial scope of the Area. There has been no role created for the CLCS with regard to delimitations between neighbouring States. It is nevertheless obvious that these two procedures are interlinked – to what extent, has however, been controversial.

4. The Role of International Courts and Tribunals in Outer Continental Shelf Disputes

4.1. Introduction

A footnote attached to the Evensen group's 1975 proposal on the Continental Shelf Boundary Commission states that 'the questions of possible appeal procedures ... and of the relationship with the proposed dispute settlement procedures under the new Convention, remain to be discussed'.[575] These questions were never answered at the Third Conference because of a lack of consensus concerning the relationship between the dispute settlement system and the establishment of the outer continental shelf.[576] Consequently, there are no provisions in UNCLOS addressing the relationship between the CLCS and the Convention's dispute settlement system. Oude Elferink points out that 'this raises the question of how a court or tribunal has to deal with the existence of the procedure involving the CLCS in a litigation between States parties to the LOS Convention concerning the interpretation or application of article 76 of the Convention'.[577]

This chapter focuses on the settlement of outer continental shelf disputes by international courts and tribunals. Jurisdictional and procedural issues are the focal point. The main goal of the chapter is to answer the following two questions:

-What is the role of international courts and tribunals in disputes regarding the establishment of the outer continental shelf?

-Are there any special factors concerning the outer continental shelf that limit the jurisdiction of international courts and tribunals?

This chapter does not address in detail the role of courts and tribunals under UNCLOS. Neither does it deal with every jurisdictional and procedural aspect of dispute settlement regarding the outer continental shelf. The subjects discussed are either controversial issues or problems of practical nature. It must be emphasised that the chapter does not make as clear distinction between delineation and delimitation disputes, as other chapters, for the reason that the settlement of these two types of disputes have much in common.

[575] Nandan & Rosenne vol. II (n 106) 850.
[576] Brown (n 291) 31.
[577] Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles' (n 296) 108.

The discussion below is divided into three parts. The first addresses the settlement of disputes in general. It looks into the dispute settlement mechanism of UNCLOS, the law-making role of international courts and tribunals and questions concerning the optional exception clause, standing and whether States are obliged to wait for recommendations from the CLCS before seeking to delimit their outer continental shelf. The second addresses the evaluation of scientific and technical evidence in cases regarding the outer continental shelf. The third briefly discusses the consequences of a judgement for the CLCS.

4.2. The Settlement of Disputes

4.2.1. Introduction

The creation of the dispute settlement part of UNCLOS is one of the more progressive steps that international law has seen in recent decades. It has been argued that the entry into force of the Convention 'is probably the most important development in the settlement of international disputes since the adoption of the UN Charter and the Statute of the International Court of Justice'.[578] Part XV of UNCLOS is dedicated to the settlement of disputes, containing 'a complex dispute settlement system that entails both traditional consent-based processes as well as mandatory procedures'.[579] Flexibility, comprehensiveness and the binding nature of the system has been described as its main benefits.[580] Boyle has noted:

> [T]he principal purposes of the Convention's provisions on dispute settlement are to provide authoritative mechanisms for determining questions relating to the 'interpretation or application' of the treaty, to guarantee the integrity of the text, and to control its implementation and development by States parties.[581]

He argues that '[f]rom this point of view compulsory dispute settlement is designed to prevent fragmentation of the conventional law of the sea'.[582] Allott, in the same tone, points out that:

> There was a very general feeling [at the Third Conference] that it would be pointless to create a legal structure of such complexity containing thousands of subtle legal relationships, if there were no secure means of resolving disputes of interpretation and application. The dispute settlement

[578] Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 ICLQ 37, 37.
[579] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005) 29.
[580] Ibid 25.
[581] Boyle (n 578) 38-9.
[582] Ibid 39.

> provisions, in all their own subtlety and complexity, should be regarded as a gloss on every substantive provision of the Convention, integrated into the very functioning of every provision.[583]

Similarly Klein notes:

> The scope and complexity of UNCLOS as a constitutive instrument demanded procedural guarantees. For States to enjoy the benefits of the Convention, they simultaneously consent to binding and mandatory dispute resolution procedures. The large number of participants at the Third Conference meant that referral to a distinct international process was needed to safeguard the balances and compromises achieved in negotiating the Convention.[584]

Although the dispute settlement mechanism was constructed carefully, to make it acceptable to as many States as possible, some aspects thereof could have been drafted in greater details. As aforementioned, an agreement was not reached at the Third Conference on the relationship between the CLCS and the dispute settlement provisions of UNCLOS. Another issue which UNCLOS fails to answer is what role the CLCS plays in continental shelf boundary delimitations beyond 200 nm. Although UNCLOS clearly provides that '[t]he actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts',[585] it does not, for instance, answer the question of whether a State is first required to receive recommendations from the CLCS before it delimits the outer continental shelf with an adjacent or opposite coastal State.

One of the fundamental rules of international law, expressed in article 2(3) of the UN Charter, provides that all parties to the UN shall 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. This rule is reflected in article 279 of UNCLOS which provides that:

> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

The means thereby indicated are 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means'.[586] Part XV of UNCLOS reflects this variety of dispute settlement mechanisms. It is divided into three sections: The first dealing with voluntary procedures, the second containing the rules on compulsory procedures entailing

[583] Allott (n 178) 11.
[584] Klein (n 579) 29.
[585] Article 9 of Annex II to UNCLOS.
[586] Article 33(1) of the UN Charter.

binding decisions, and the third including rules on limitations and exceptions to the applicability of the second section. Other Parts and Annexes to UNCLOS are also of importance. Part XI, section 5, contains provisions for the settlement of deep seabed mining; Annex V addresses conciliation; the Statute of ITLOS is found in Annex VI; and Annexes VII and VIII contain the rules on arbitration and special arbitration.

4.2.2. The Main Dispute Settlement Provisions of UNCLOS

4.2.2.1. Voluntary Procedures

The compulsory procedures entailing binding decisions are only applicable 'when informal mechanisms do not lead to the settlement of disputes'.[587] Disputing parties must consider whether the voluntary procedures under the Convention are applicable before the compulsory procedures become available.[588] This applies to disputes regarding the outer continental shelf as well as to other disputes falling under Part XV.

Section 1 of Part XV provides for various peaceful methods of settling disputes. The '[s]ection highlights the continuing relevance of traditional, consent-based modes of dispute resolution in relation to the interpretation and application of UNCLOS and emphasizes the flexibility that must be accorded to States in choosing methods for dispute resolution'.[589] Article 280 of the Convention illustrates the importance of consent. It provides that nothing in Part XV 'impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of [UNCLOS] by any peaceful means of their own choice'. The rule 'is intended to make it as clear as possible that the parties to the dispute are complete masters of the procedure to be used to settle it'.[590] States 'can at any time agree to depart from the provisions of Part XV and agree to use instead any peaceful means of their own choice. They have the option even if any procedure under this Part has been started'.[591]

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[587] Noyes (n 266) 1215. See article 281 of UNCLOS. Part XV is only applicable in case of a dispute. If no dispute exists there is of course no need to resolve it.
[588] Satya Nandan & Louis Sohn (eds.) *United Nations Convention on the Law of the Sea; A Commentary* vol. V (Martinus Nijhoff 1989) 38.
[589] Klein (n 579) 31.
[590] Nandan & Sohn (n 588) 20.
[591] Ibid 20-1.

Article 283(1) provides for the status of negotiation as a tool for settling law of the sea disputes. It reads: 'When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.' The obligation is continuing and 'applicable at every stage of the dispute',[592] holding until the implementation of a settlement reached.[593] Conciliations under Annex V is also encouraged as a resort prior to compulsory dispute settlement procedures.[594] States can also solve their disputes outside the framework of UNCLOS if certain conditions are met, either by agreeing to seek the settlement of a dispute by peaceful means of their own choice or by procedures under general, regional or bilateral agreements.[595]

4.2.2.2. Compulsory Procedures

The first provision of the compulsory procedure part of UNCLOS, article 286, provides that:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 286 signifies a new era in the international law of the sea. It provides that if traditional, consent-based, non-compulsory methods of dispute settlement are not fruitful, a new phase begins which is compulsory in nature (with a few important

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[592] Ibid 29.

[593] Article 283(2) of UNCLOS. ITLOS has taken the view that the negotiation requirement is satisfied when a State Party concludes that the possibilities of settlement under section 1 of Part XV have been exhausted. *Southern Bluefin Tune Cases (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures) (1999) ITLOS No. 3 & 4, 38 ILM 1624, 1633, paras. 60-1; *The MOX Plant Case (Ireland/United Kingdom)* (Provisional Measures) (2001) ITLOS No. 10, 41 ILM 405 at 414, para. 60; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures) (2003) ITLOS No. 12, 126 ILR 487, 499, para. 48.

[594] Article 284 of UNCLOS. Conciliation has been defined as:

> A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.

Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961. See 49 (ii) Annuaire de l'Institut de Droit International 385-391.

[595] Articles 281 and 282 of UNCLOS. In these instances the 'alternative dispute settlement procedures may take priority over those in UNCLOS'. Klein (n 579) 23. This was highlighted in the *Southern Bluefin Tuna Cases (Australia/Japan; New Zealand/Japan)* (2000) (Arbitration Tribunal) (Award on Jurisdiction and Admissibility) 39 ILM 1359, 1391, para. 63 (*Southern Bluefin Tuna (Arbitration*)).

exceptions addressed in section 3).[596] The procedure is indeed not only compulsory, but also final and binding between the parties.[597]

Two factors concerning article 286 are of special importance. First, 'there is an obligation ("shall," not simply "may") to submit the dispute to the procedure under section 2'.[598] Secondly:

> Once a State ratifies or otherwise expresses its consent to be bound by the Law of the Sea Convention, by that very action it expresses also its consent to the applicability to disputes to which it is a party of the procedures specified in section 2 of Part XV. No further agreement between the parties to a dispute is necessary to submit the dispute to the procedures specified in section 2 of that Part.[599]

Consequently, '[u]nilateral action is sufficient to vest the court or tribunal with jurisdiction, and that court or tribunal may render a decision whether or not the other party participates in the process'.[600] This renders the role of courts and tribunals especially important in the law of the sea.

4.2.2.3. Choice of Procedure

The UNCLOS dispute settlement system is not unitary in nature. Unlike most such systems it embodies flexibility vis-à-vis the available jurisdictions for disputes. Article 287 provides that when a State signs, ratifies or accedes to UNCLOS, or at any time thereafter, it shall be free to choose, by written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention:[601]

> (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
> (b) the International Court of Justice;
> (c) an arbitral tribunal constituted in accordance with Annex VII;
> (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[602]

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[596] Compulsory dispute settlement was not the norm but the exception, in the law of the sea, until UNCLOS entered into force in 1994.
[597] Article 296 of UNCLOS.
[598] Nandan & Sohn (n 588) 39.
[599] Ibid 38.
[600] Ibid 39.
[601] The formula is often called the 'Montreux formula', after the Swiss town where some interested delegations of the Third Conference met privately and discussed which court or tribunal should have jurisdiction under UNCLOS.
[602] Proceedings before a special arbitral tribunal are not available in a dispute regarding the establishment of the outer continental shelf because the special arbitral tribunal has only jurisdiction in cases regarding fisheries, protection and preservation of the marine environment, marine scientific research and navigation. See article 1 of Annex VIII to UNCLOS. Article 287(2) contains an exception to the flexible Montreux formula. The provision clearly provides that 'a declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of [ITLOS] to the extent and in the manner provided for in Part XI, section 5'.

Nelson has pointed out that this mechanism 'is the distinctive feature of the dispute-settlement system in the LOS Convention'.[603] Nelson notes that '[i]t reflects the trend of modern international law with its diversity and flexibility of response in terms of peaceful settlement of disputes tailored to meet the need of present-day international society'.[604] Others were, however, sceptical of this formula. Some delegates at the Third Conference 'emphasized the need for uniformity of international jurisprudence and the danger of having too many tribunals which might render conflicting decisions'.[605] In other words, they were worried about the fragmentation of international law. One aspect of fragmentation is the threat which the proliferation of judicial bodies has on the international legal system which supposedly undermines the coherence of international law in specialist regimes, leading to the divergence 'from their international law roots and expound specialist rules of limited application'.[606] Although fragmentation is a large troll in the literature it is a dwarf in practice. In his study on whether international law was threatened by multiple international tribunals, Charney came to the following conclusion:

> On the basis of the available evidence, no substantial breakdown in the unity of central norms of general international law has developed. The ICJ's influence and prestige are high. They do not appear to be threatened by the addition of other standing and *ad hoc* tribunals authorized to decide disputes involving international law.[607]

Simma similarly notes: 'Rather than resulting in fragmentation, the emergence of more international courts, combined with an increasing willingness of states to submit their disputes to judicial settlement, has revived international legal discourse.'[608] This does not mean that the fragmentation threat is non-existent. However, international courts and tribunals have largely managed to avoid fragmentation by considering international law as a whole and making reference to

[603] Nelson, 'The Settlement of Disputes Arising from Conflicting Outer Continental Shelf Claims' (n 392) 410.
[604] Ibid.
[605] Nandan & Sohn (n 588) 41; See also Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 ICLQ 863ff; Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge Grotius Publications 1991) 18-22; Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 ICLQ 848, 861-2.
[606] Boyle & Chinkin (n 229) 263.
[607] Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals' (1998) 271 Recueil de Cours 101, 373.
[608] Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 279.

the work of other courts (although ICJ is quite reluctant to state as much in its judgements).[609]

It is important that international courts and tribunals address the problems of coherence and fragmentation.[610] This will be a particularly important task in outer continental shelf delimitations since, as discussed in the previous chapter, the CLCS makes legal decisions regarding the application and interpretation of UNCLOS. As a scientific and technical body with a limited mandate it is possible that the Commission has too narrow a view of international law and does not adopt an integrated conception of international law. Moreover, Bangladesh and Myanmar have settled their boundary dispute before ITLOS, a dispute between Nicaragua and Colombia was recently heard before the ICJ involving claims to the outer continental shelf, and the second part of the maritime boundary disputes in the northern part of the Bay of Bengal (Bangladesh v. India) will be litigated before an arbitral tribunal within the next year.[611] International courts and tribunals will therefore not only have the role of settling disputes in outer continental shelf delimitations but also in safeguarding a holistic interpretation of the law and saving it from fragmentation. It is no coincidence that ITLOS addressed fragmentation during the course of its judgement in the *Bay of Bengal Case*:

> The Convention sets up an institutional framework with a number of bodies to implement its provisions, including the Commission, the International Seabed Authority and this Tribunal. Activities of these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention. The same is true of other bodies referred to in the Convention.[612]

Judges Treves and Wolfrum addressed the issue more directly in their separate opinions. Treves stated that 'all courts and tribunals called to decide on the interpretation and application'[613] of UNCLOS should 'consider themselves as parts of a collective interpretative endeavour, in which, while keeping in mind the need to

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[609] Ibid 282-4 & 287; See also Boyle & Chinkin (n 229) 297; Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 MLR 1, 16-7.

[610] Wolfrum notes that another important task international courts and tribunals have is 'to provide for transparency and predictability of the whole process'. *Declaration of Judge Wolfrum* (n 182) 2.

[611] Bangladesh v. India (8 October 2009) <http://pca-cpa.org/showpage.asp?pag_id=1376> accessed 18 July 2012 (Bangladesh v. India).

[612] *Bay of Bengal Case* (n 4) 110, para. 373.

[613] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)* (Judgement) (Declaration of Judge Treves) 2012 <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/5-C16.decl.Treves.orig.E.pdf> accessed 16 July 2012 [1, para. 2] (*Declaration of Judge Treves*).

ensure consistency and coherence, each contributes its grain of wisdom and its particular outlook'.[614] In the same line of reasoning Wolfrum noted:

> [A]rticle 287 of the Convention entrusts three institutions with the task and responsibility of interpreting and, within the framework of the Convention, to progressively develop it. This requires them to harmonize their jurisprudence with the view avoiding any fragmentation, in particular in respect of delimitation of maritime areas.[615]

Coming back to the forum selection clause of UNCLOS, in article 287(4) it is made clear that when 'the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree'.[616] If, however, 'the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree'.[617] Similarly, '[a] State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII'.[618] The fact that only around a quarter of the member States to UNCLOS has made a declaration under article 287[619] makes arbitration the automatic venue.

Complications arise when a dispute involves more than two parties and they do not agree on the forum for dispute settlement and, given the circumstances, it is possible to split the dispute in two or more parts which can be adjudicated upon separately. This is the situation in the Bay of Bengal. As noted above, the dispute between Bangladesh and Myanmar was litigated before ITLOS whilst the dispute between India and Bangladesh will be litigated before an arbitral tribunal. Although the tribunals are not bound by each other's decisions it must be very likely, in the interest of preventing fragmentation of the legal framework, that the tribunal will seriously consider the implications of its decisions in the context of other affected cases that is not before them. It must be pointed out that three judges (Mensah,

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[614] Ibid 1-2, para. 2. Treves pointed also out that '[t]he coexistence of a jurisprudence on delimitation of the [ICJ] with awards of arbitration tribunals augurs well. Arbitration tribunals have participated, in an harmonious manner, in the development of the jurisprudence emerging from the judgments of the [ICJ].' Ibid.

[615] *Declaration of Judge Wolfrum* (n 182) 2.

[616] ITLOS has accepted that States are able to transfer disputes from an Annex VII arbitral tribunal to the Tribunal even though an agreement between the parties on this issue was reached after submission to adjudication had been effected under articles 286 and 287 of UNCLOS. See e.g. *Bay of Bengal Case* (n 4) 9-10, paras. 1-6; *Declaration of Judge Treves* (n 613) 2-6, paras. 3-12.

[617] Article 287(5) of UNCLOS.

[618] Ibid article 287(3).

[619] See Settlement of Disputes Mechanism <http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm> accessed 16 July 2012.

Treves and Wolfrum) in the case between Bangladesh and Myanmar will hear the case between Bangladesh and India, forming the majority of the arbitral tribunal. All voted in favour of the ITLOS judgement and Treves and Wolfrum, as discussed above, made special declarations warning against the threat of fragmentation. This fact makes it very likely that the application and interpretation of the law in the Bangladesh v. India case will be in harmony with the application and interpretation of the law in the case between Bangladesh and Myanmar.[620]

4.2.3. The Law-Making Role of International Courts and Tribunals

Under the ICJ Statute judicial decisions are only a subsidiary source of international law and are binding merely on the parties to a particular case.[621] The impact of the decisions of the ICJ and other judicial settlement bodies are in practice, however, much more than subsidiary and have a law-making effect that does not only affect the parties to the case.[622] Rosalyn Higgins points out that:

> States which have no dispute before the Court follow the judgements of the Court with the greatest interest, because they know that every judgement is at once an authoritative pronouncement on the law, and also that, should they become involved in a dispute in which the same legal issue arise, the Court, which will always seek to act consistently and build on its own jurisprudence, will reach the same conclusions. Although at the formal level the judgement of the Court in the case of State A v. State B will not bind State Z, State Z is bound by the relevant rule of international law, which has been articulated by the Court, and which would no doubt be directly applicable to it also, if the occasion arose.[623]

In a similar tone, Boyle and Chinkin note that the ICJ 'behaves as though its decisions have precedential value and thus consciously contributes to substantive law-making. It assumes the role of authoritative interpretation of procedural and substantive international law and its pronouncements are widely accepted as such'.[624] Judgements and awards of international courts and tribunals are of greater importance for international maritime boundary law than for other fields of international law. In fact, compared to other fields of international law, an unusually high number of maritime boundary disputes have been resolved before courts and tribunals. It has been argued that an explanation for this could be '[t]he particular

[620] Bangladesh v. India (n 611).
[621] Article 38(1)(d) and 59 of the ICJ Statute.
[622] Wolfrum notes in his declaration in the *Bay of Bengal Case* that it is doubtful whether the Statute 'adequately describes the role that international case law plays and is meant to play in the delimitation of the continental shelf and the [EEZ]'. *Declaration of Judge Wolfrum* (n 182) 1.
[623] Rosalyn Higgins, *Problems & Process: International Law and How We Use it* (Oxford University Press 1994) 202-3.
[624] Boyle & Chinkin (n 229) 293.

need for certainty in boundary delimitation and consequential resource allocation'.[625] Another explanation could be that judgements and awards are accompanied by full reasoning as to why a specific delimitation line was chosen.[626] According to Charney, there are two main reasons for the particular importance of international courts and tribunals in this field:

> [F]irst, the existence of a unique line of jurisprudence made possible by a continuing series of decisions and, second, the absence of clearer guidance from codification efforts, *opinio juris* and state practice. *De facto*, the International Court, with some assistance from ad hoc arbitrations, exercises substantial authority over international maritime boundary law. These tribunals take account of the jurisprudence on the subject and the state practice found in agreements settling maritime boundaries. The judgement and awards articulate and shape states' obligations in this regard. Even though there is no doctrine of *stare decisis* in international adjudication, it is not inaccurate to consider the impressive line of maritime boundary decisions as forming a common law in the classic sense.[627]

Similarly, Weil argued that 'the legal conquest of maritime delimitation is not the work of either treaty or custom but of the courts which, far from being subsidiary source of international law, here play the role of a primary and direct source of law, even if they chosen modestly to ascribe the credit to customary law'.[628] Wolfrum argued from the same perspective, noting in his declaration in the *Bay of Bengal Case* that '[c]ase law of international courts and tribunals is more than a means to identify the customary or treaty law relevant for the delimitation of continental shelves and [EEZs] as stated by the Tribunal'.[629] In his 'view international courts and tribunals in respect of maritime delimitation exercise a "law-making function", a function which is anticipated and legitimized by articles 74 and 83 of the Convention'.[630] Moreover, Wolfrum stated:

> The ensuing international case law constitutes an *acquis judiciare*, a source of international law to be read into articles 74 and 83 of the Convention. It is the feature of this law not to be static but to be open for a progressive development by the international courts and tribunals concerned. It is the responsibility of these international courts and tribunals not only to decide delimitation cases while remaining within the framework of such *acquis judiciare* but also to provide for the progressive development of the latter.[631]

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[625] Ibid 295.
[626] This is not the case with negotiated boundary lines. The parties to a maritime boundary agreement are not required to give any explanation as to why a particular boundary line was chosen. See e.g. Nuno S. Marques Antunes, 'Some Thoughts on the Technical Input in Maritime Delimitation' in IMB 5 (n 184) 3377, 3380.
[627] Jonathan Charney, 'Progress in International Maritime Boundary Delimitation Law' (1994) 88 AJIL 227, 227-8.
[628] Weil, *The Law of Maritime Delimitation* (n 158) 8.
[629] *Declaration of Judge Wolfrum* (n 182) 2.
[630] Ibid.
[631] Ibid.

Bearing this in mind, it appears safe to assert that the jurisprudence in maritime boundary delimitations supports the view 'that adjudication is never simply a mechanical process of applying rules, but always involves an element of legislation'.[632]

4.2.4. The Optional Exception Clause

4.2.4.1. Introduction

Some disputes have traditionally been categorised as 'too closely tied to the vital interests, independence or honour of the State to be left to the decision of a third party'.[633] It should therefore not come as a surprise that some types of disputes are not included in the compulsory dispute settlement procedure of UNCLOS and that States can by declaration exclude certain sensitive issues therefrom. Because of this sensitivity and the general reluctance to allow reservations[634] to the Convention, 'an agreement was reached early in the Conference on the need for a list of well-defined classes of disputes which may be exempted from such adjudication by a declaration filed in advance'.[635] This can be seen as 'an attempt to balance the desire to be a judge in one's own cause against the principle of binding third-party settlement'.[636] Among the exempted disputes are disputes concerning maritime boundaries between adjacent and opposite States, including continental shelf boundaries. Since more than a dozen States have claimed, or are going to claim, areas of continental shelf beyond 200 nm, and have made a declaration exempting maritime boundary disputes from the compulsory dispute settlement procedure, the optional exception clause and the non-binding compulsory conciliation procedure merit attention.

4.2.4.2. The Maritime Boundary Exception

Article 298(1) of UNCLOS provides that when a State signs, ratifies or accedes to UNCLOS 'or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of' the three

[632] Merrills (n 230) 100.
[633] Klein (n 579) 9.
[634] The outcome of this reluctance is found in article 309 of UNCLOS which states: 'No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.'
[635] Nandan & Sohn (n 588) 109.
[636] Merrills (n 230) 173.

following categories of disputes. One of these categories includes 'disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations'.[637] The reference to article 83 clearly provides that delimitation disputes regarding the continental shelf within or beyond 200 nm can be excluded by declaration. Sixteen States,[638] which have either made a submission to the CLCS or submitted to the Secretary-General preliminary information indicative of the outer limits of the continental shelf, and Canada (which is expected to make a submission to the CLCS in the near future)[639] have made a declaration under article 298(1) of UNCLOS which excludes maritime boundary disputes from the compulsory dispute settlement provisions of the Convention. Most of these declarations exclude all maritime zones mentioned in the provision. Iceland is the only State merely excluding continental shelf boundary disputes from the compulsory procedure.[640] In addition, four States which have claimed areas of continental shelf beyond 200 nm have declared that they only accept particular fora for cases falling under article 298(1). Norway and Denmark have declared that they do not accept arbitral tribunals for any of the disputes mentioned in article 298(1).[641] Nicaragua only accepts the jurisdiction of the ICJ in disputes regarding issues falling under article 298(1), whilst Guinea-Bissau 'does not accept the jurisdiction of the [ICJ] [for the purposes of article 287] and consequently will not accept that jurisdiction with respect to articles 297 and 298'.[642] It must be noted that although a State has opted to exclude disputes concerning maritime boundaries the parties in dispute can by agreement submit their dispute to section 2 procedures.[643] This applies both to the forum and the type of dispute.

The exceptions in article 298 'are not self-judging, and their applicability in a particular case cannot be determined by their invocation by the State party against

[637] Article 298(1)(a)(i) of UNCLOS.
[638] Australia, Argentina, Chile, China, Equatorial Guinea, France, Gabon, Ghana, Iceland, Mexico, Portugal, the Russian Federation, the Republic of Korea, Palau, Spain and Trinidad & Tobago. See Declarations and statement. Available at <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm> accessed 16 July 2012 (Declarations & Statements).
[639] Canada did not become an UNCLOS party until 2004. It therefore has 10 years from that time to make a submission under article 4 of Annex II to UNCLOS. See List of ratification (n 439).
[640] See Declarations & Statements (n 638).
[641] Ibid.
[642] Ibid.
[643] Article 299(1) of UNCLOS.

which a complaint is brought'.[644] Article 288(4) clearly provides: 'In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.' A court or tribunal obviously has the *compétence de la compétence.*[645] It must be emphasised that a declaration made under article 298 is subject to reciprocity. A State making such a declaration is not 'entitled to submit any dispute falling within the excepted category of disputes to any procedure in [UNCLOS] as against another State Party, without the consent of that party'.[646] It must also be noted that a State which has made a declaration under article 298 is not forever bound thereby. It 'may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified' in UNCLOS.[647] The withdrawal of a declaration, or the making of a new one, does not however 'in any way affect proceedings pending before a court or tribunal ... unless the parties otherwise agree'.[648] Therefore, a State cannot block proceedings in cases that fall under article 298(1) which already has begun by making a declaration which exempts such matters.

Some might argue that the exceptions and limitations are a weakness for the compulsory dispute settlement procedures. Such criticism is answered by Klein in the following manner:

> Part XV had to be constructed to reflect the political dynamic of the Third Conference and while the result cannot be described as perfect, it is evident that the dispute settlement regime is carefully tailored to specific issue areas to ensure the greatest workability possible. Although resort to mandatory arbitration or adjudication has been excluded for some questions when this avenue could have served a valuable purpose, States rejected this approach because it did not accord with political realities or because binding dispute settlement was not necessary. Such a selective approach does not undermine the viability of the Convention for those issues. International regimes have been able to function quite successfully regardless of the availability of a system of mandatory jurisdiction. Instead, external regulating factors, mutual interests, and diplomatic avenues facilitate dispute settlement.[649]

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[644] Nandan & Sohn (n 588) 140.
[645] The PCIJ held in an advisory opinion that: 'As a general rule, any body possessing jurisdictional powers has the right … to determine the extent of its jurisdiction'. *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, (Advisory Opinion) [1928] PCIJ Rep Series B No. 16, 3, 20.
[646] Article 298(3) of UNCLOS.
[647] Ibid article 298(2)
[648] Ibid article 298(5).
[649] Klein (n 579) 28.

4.2.4.3. Are Disputes Concerning the Interpretation or Application of Article 76 excluded from the Compulsory Dispute Settlement Procedure?

Although almost all UNCLOS disputes are in principle subject to compulsory third party dispute settlement, and whilst article 76 is not among the provisions mentioned in the optional exceptions clause in section 3 of Part XV, some scholars have argued that challenges to the outer limits of the continental shelf are excluded from Part XV of UNCLOS. Smith and Taft are among them. They state that the Third Conference 'negotiators opted to create a Commission with recommendatory powers, and to exclude establishment of the outer limits of the continental shelf from compulsory and binding third-party dispute settlement procedures' on the basis of the 'complexity of Article 76, the need for consistency in applying its provisions, and the sensitivity of coastal States related to sovereign rights'.[650] A similar position is taken in an UN publication which notes that UNCLOS does not 'under Part XV, Section 2, provide for compulsory dispute settlement for article 76 issues'.[651] Other authors have a different view. Clingan stated:

> Whether the final adoption [by a coastal state of its outer limit] is perceived to be 'on the basis' of the Commission recommendations may itself be a question that could be resolved by traditional juridical dispute settlement procedures provided for in the Convention, a question of treaty interpretation being involved. This view of the Commission is in accord with the wishes of the various negotiators [at the third conference].[652]

In line with Clingan, Eiriksson states that he 'finds nothing that precludes a State Party to the Convention from bringing a case before the appropriate Convention body if it should feel that a coastal State, not having acted "on the basis of" the Commission's recommendations, establishes boundaries which it disputes'.[653] In addition, he points out that '[t]he question of seaward demarcation of the continental shelf is not one of optional exceptions to compulsory dispute settlement mechanisms allowed under article 298'.[654] Brown makes a similar argument and points out that there is 'no exception provided for outer limit disputes, but only for disputes over delimitation between opposite or adjacent States under Article 298(1)(a)(i)'.[655] In

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[650] Smith & Taft (n 123) 20.
[651] *The Law of the Sea; Definition of the Continental Shelf; An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations 1993) 29, para. 87.
[652] Clingan, 'Dispute Settlement among Non-Parties to the LOS Convention with Respect to the Outer Limits of the Continental Shelf' (n 282) 497.
[653] Eiriksson, 'The Case of Disagreement Between a Coastal State and the CLCS' (n 293) 258.
[654] Ibid.
[655] Brown (n 291) 32.

Anderson's opinion. the provisions in Part XV 'also apply in principle to disputes over the outer limits of the continental shelf in article 76'.[656] McDorman points out:

> It would have been possible in the LOS Convention phraseology excluding or precluding contesting an outer limit claim through the dispute settlement procedures. Alternative phraseology could have been included which would have provided that accord between a submitting state and the Commission precluded the use of third-party adjudication or created a strong presumption in favour of preclusion. No such language exists.[657]

Wolfrum addresses the issue from a different angle. He notes that '[t]he procedure applied by the Commission does not give States with adjacent or opposite coasts sufficient procedural guarantees to defend their position which could possibly justify any exemption of such disputes from the compulsory settlement mechanisms under Part XV of the Convention'.[658] In a similar tone the ILA Committee noted: 'If article 76 were to be completely excluded from the procedures of Part XV, the absence of legal expertise in the Commission would seem to be problematic, as there then would be hardly any possibility to submit questions of interpretation raised by a submission to legal scrutiny.'[659]

The position taken in this thesis is in line with that of Anderson, Brown, Clingan, Eiriksson, McDorman and Wolfrum. Disputes regarding the outer limits of the continental shelf – that is disputes about article 76 – are in general not excluded from the dispute settlement procedure of Part XV of UNCLOS, because the Convention's provisions on the limitations and exceptions to the applicability of the compulsory binding procedures entailing binding decisions are an exception from the basic norm of Part XV. Section 3 of Part XV does not mention any of the Convention's provisions on the breadth of maritime zones, including article 76. It must therefore be assumed that disputes regarding the outer limits of the outer continental shelf are not in general excluded from the dispute settlement mechanism of UNCLOS. It must be noted, however, that if a dispute concerns the interplay between article 76 and 83 – such as in the *Bay of Bengal Case* – the optional exception clause would apply since such a dispute would not only involve article 76, but also article 83.

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[656] David Anderson, 'Maritime Boundaries and Limits: Some Basic Legal Principles' in David Anderson (ed.) *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff 2008) 381, 391.
[657] McDorman, 'The Role of the Commission on the Limits of the Continental Shelf' (n 341) 318.
[658] Wolfrum (n 239) 28.
[659] 2004 ILA Report (n 71) 777.

4.2.4.4. Compulsory Conciliation

A State which has used the optional exception clause shall 'when such a dispute arises ... and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2'.[660] In these circumstances conciliation is compulsory. So far, no maritime boundary dispute has been subject to compulsory conciliation.[661] Notwithstanding, Merrills points out that 'if the prospect of obligatory conciliation discourages unreasonableness, it will have done its job'.[662] Conciliation is the only compulsory procedural path which can be unilaterally taken by a State which has an outer continental shelf boundary delimitation dispute with a State that has made a declaration in accordance with article 298(1)(a)(i).

It must be emphasised that four categories of disputes are excluded from the compulsory conciliation of UNCLOS and which are therefore absolutely excluded from section 2 procedures. These disputes are: (1) Disputes that arose before the entry into force of UNCLOS (16 November 1994).[663] It has been pointed out that '[t]his condition is grounded in the presumption against retroactivity in the law of treaties and prevents any longstanding disputes being made subject to Part XV of UNCLOS'.[664] (2) Mixed disputes, that is 'any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory'.[665] (3) '[S]ea boundary dispute[s] finally settled by an arrangement between the parties'.[666] (4) Disputes that are 'to be

[660] Article 298(1)(a)(i) of UNCLOS.
[661] Although no instances of compulsory conciliation have taken place, voluntarily ones have. See *Report and Recommendations to the Governments of Iceland and Norway* (Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen) (1981) 20 ILM 797 (*Jan Mayen Conciliation*).
[662] Merrills (n 230) 176.
[663] Article 298(1)(a)(i) of UNCLOS. See Louis B. Sohn, 'Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?' (1983) 46 Law & Contemp. Probs. 195, 198; Nandan & Sohn (n 588) 133.
[664] Klein (n 579) 258.
[665] Article 298(1)(a)(i) of UNCLOS.
[666] Ibid article 298(1)(a)(iii). This category probably also includes 'an arrangement resulting from acceptance by the parties of an arbitral or judicial decision'. Nandan & Sohn (n 588) 133.

settled in accordance with a bilateral or multilateral agreement binding upon those parties'.[667]

The purpose of a Conciliation Commission is to 'hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement'.[668] The commission shall report within 12 months of its constitution.[669] The report 'shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement'.[670] It must be strongly emphasised that '[t]he report of the commission, including its conclusions or recommendations, shall not be binding upon the parties'.[671]

Article 298(1)(a)(ii) provides that 'after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report'. Although it is clear that the Conciliation Commission's report does not have the binding force of a judgement or an arbitral award, the parties are 'obliged to pay proper attention to the report and to negotiate in good faith ... an agreement on the basis of that report'.[672] Klein notes that '[t]he utility of conciliation reports lies in the elaboration of principles that could be applied by the parties in future negotiations'.[673] She importantly points out that '[s]uch a method is not without precedent – the ICJ was charged with this responsibility in the North Sea Continental Shelf cases, rather than being asked to

[667] Article 298(1)(a)(iii) of UNCLOS. The Virginia Commentary notes that 'it is not clear whether the agreement must provide for a procedure entailing a binding decision, or whether an agreement might provide merely that a particular dispute be settled by the mediation of the Pope, or by the good offices of the Secretary-General of the United Nations'. Nandan & Sohn (n 588) 134. The Commentary argues that '[t]he second interpretation seems consistent with the basic principle granting to the parties to a dispute complete freedom to determine the means by which they want to settle a dispute and to exclude by other means'. Ibid. Moreover, it notes that '[t]his interpretation is also supported by the fact that such agreement would not exclude compulsory recourse to adjudication under Part XV, section 2, but only compulsory recourse to conciliation'. Ibid.
[668] Article 6 of Annex V of UNCLOS. See also Merrills (n 230) 65-9. The rules applicable to voluntarily conciliation apply also to compulsory conciliation, except for the provision on institution of proceedings. See article 14 of Annex V.
[669] Article 7(1) of Annex V of UNCLOS.
[670] Ibid.
[671] Ibid article 7(2).
[672] Nandan & Sohn (n 588) 134.
[673] Klein (n 579) 257.

define the actual location of the boundary'.[674] This implies that the outcome of the compulsory conciliation procedure can in some instances be very similar to that of a binding judgement.

Article 298(1)(a)(ii) states that if negotiations conducted on the basis of the Conciliation Commission's report do 'not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree'.[675] This agreement must 'be negotiated in good faith, but it can come into effect only by mutual consent'.[676] If it is impossible to reach such agreement, 'the only obligation that remains is the one under Part XV, section 1, to proceed expeditiously to an exchange of views regarding the settlement of the dispute by further negotiations or' other peaceful means.[677] This outcome returns the disputing parties to square one.

To summarise what has been stated above, it is clear that States can exclude disputes regarding the delimitation of the outer continental shelf from the compulsory dispute settlement mechanism of Part XV of UNCLOS. States that have done so can be expected to be brought before a conciliation commission which issues non-binding reports. Disputes regarding article 76 not involving article 83 issues cannot, however, be excluded from the compulsory dispute settlement procedure on the basis of the optional exception clause.

4.2.5. Standing

4.2.5.1. CLCS and the Authority

Until the twentieth century, the traditional view was that States alone enjoyed standing (*locus standi*) before international courts and tribunals. In line with more modern ideas, article 291(2) opens the door to non-State entities to the dispute settlement mechanism of UNCLOS. It provides that the dispute settlement procedures of Part XV 'shall be open to entities other than States Parties', however 'only as specifically provided for in' UNCLOS. As will be explained below, the dispute settlement mechanism of UNCLOS is not open to the CLCS under any

[674] Ibid; See *North Sea Case* (n 26) 13, para. 2.
[675] Article 298(1)(a)(ii) of UNCLOS. Some authors have pointed out that this provision is rather peculiar. See e.g. Klein (n 579) 260.
[676] Nandan & Sohn (n 588) 134.
[677] Ibid.

circumstances, and nor is it open for the Authority in disputes concerning the establishment of the outer continental shelf. It therefore came as a surprise when the arbitral tribunal, in the *Case Concerning Delimitation of Maritime Areas between Canada and the French Republic*,[678] used as one of the arguments for the refusal to address the delimitation of the outer continental shelf that the case concerned not only the parties to the dispute but also the international community. The tribunal held:

> Any decision by this Court recognizing or rejecting any rights of the Parties over the continental shelf beyond 200 nautical miles, would constitute a pronouncement involving a delimitation, not 'between the Parties' but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international sea-bed Area ... that has been declared to be the common heritage of mankind ... This Court is not competent to carry out a delimitation which affects the rights of a Party which is not before it. In this connection the Court notes that in accordance with Article 76, para. 8 and Annex II of the 1982 Convention on the Law of the Sea, a Commission is to be set up, under the title of 'Commission on the Limits of the Continental Shelf', to consider the claims and data submitted by coastal States and issue recommendations to them. In conformity with this provision, only 'the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.'[679]

In his dissenting opinion, Weil rejected the majority view. He stated:

> Nor am I convinced of the idea on which the Court bases its Decision, namely that the broad continental shelf ought to give rise to a delimitation between Canada and France on one side, and on the other the international community, a Party which is not present in these proceedings and which should be represented by the 'Commission on the Limits of the Continental Shelf' – a body which does not yet exist …[680]

As aforementioned, the standing of entities other than States must be specifically provided for in the Convention. Nothing in UNCLOS indicates that the CLCS enjoys standing. In addition, '[t]here is no explicit reference to the CLCS in any provision of the Convention addressing the access to' the dispute settlement mechanisms of Part XV.[681] It must, however, be noted that in the *Reparation Case* the ICJ accepted that the UN was 'capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims'[682] even although the UN Charter was silent on this issue. The Court based this conclusion on functional

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[678] *Court of Arbitration for the Delimitation of Maritime Areas between Canada and France: Decision in Case Concerning Delimitation of Maritime Areas (Canada v. France)* (Arbitration Tribunal) (1992) 31 ILM 1148 (*St. Pierre & Miquelon Case*).
[679] Ibid 1172, paras. 78-79.
[680] Dissenting opinion of Weil in the *St. Pierre & Miquelon Case* (n 678) 1215, para. 42.
[681] 2004 ILA Report (n 71) 784. ITLOS did not mention the *St. Pierre & Miquelon Case* in its judgement in the *Bay of Bengal Case*. The reason could be that the area of delimitation in the case was situated far from the Area so the Area was not a subject of consideration.
[682] *Reparation Case* (n 245) 174, 179.

arguments, i.e. that UN could not operate effectively without this function.[683] In this context the question arises as to whether the CLCS could be given standing before international courts and tribunals based on similar reasons. Since the mandate of the CLCS is very narrow compared to that of UN and because the CLCS issues only recommendations, it is doubtful whether the CLCS needs standing to execute its mandate. Suarez has pointed out that the legal personality of the CLCS 'under international law is limited and does not include becoming a party to a judicial forum'.[684] Moreover, it must be questioned 'whether the participation of the CLCS as a party in proceedings before a court or tribunal would be either desirable or practically feasible in the light of its nature and function'.[685] Consequently, it seems safe to support Nelson's assertions that '[i]t is certain ... that the Commission has not been granted the power to submit any dispute concerning the outer limit of a coastal State's continental shelf to any court or tribunal'.[686]

With regard to the Authority, articles 134(4) and 84(2) of UNCLOS read in conjunction with para. 1 of section 1 of the Annex to the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982,[687] indicate that the Authority has no role in the establishment of the outer continental shelf, except for the limited task of depositing charts and co-ordinates which States have submitted that show the outer limit line of the continental shelf. Wolfrum has noted that the *St. Pierre and Miquelon Case* 'is open for criticism since it does not take into consideration that the International Seabed Authority does not have a mandate concerning the delimitation of the Area and for

[683] Ibid 177-84.
[684] Suarez (n 23) 232. Suarez is of the view that the CLCS has a limited legal personality since it is permitted to enter into cooperation arrangements with the IOC and IHO and other competent international organisations under article 3(2) of Annex II to UNCLOS. Ibid 80.
[685] 2004 ILA Report (n 71) 784 fn. 50. The ILA Committee discusses whether it is possible to use article 20(2) of Annex VI to establish standing for the CLCS – it rejects that possibility. Ibid 784.
[686] Nelson, 'Claims to the Continental Shelf Beyond 200-mile limit' (n 291) 579; See also Nelson, 'The Continental Shelf' (n 254) 1239; See also David Anderson, 'Developments in Maritime Boundary Law and Practice' (n 184) 3215.
[687] Adopted 28 July 1994, provisionally entered into force 16 November 1994 and definitively 28 July 1996, 1836 UNTS 3. Paragraph 1 of section 1 of the Annex to the Agreement provides: '[The Authority] is the organization through which States Parties to the Convention shall ... organize and control activities *in* the Area, particularly with a view to administering the resources of the Area' (emphasis added).

that reason is not represented at the deliberations of the Commission'.[688] Although the Authority does not enjoy standing under Part XV, it may be asked whether it enjoys standing before ITLOS' Sea-bed Disputes Chamber. Section 5 of Part XI of UNCLOS gives the Authority limited standing before the Chamber; however, the jurisdiction of the chamber is limited to activities *in* the Area.[689] Consequently, a dispute regarding the delineation of the outer continental shelf lies outside its competence.

Nevertheless, there exists a possibility that the Seabed Disputes Chamber could indirectly consider the delineation of the outer continental shelf if a coastal state purported to exercise its continental shelf rights in an area which the Authority considered to be part of the Area. If a coastal State attempted to explore or exploit minerals in an area that is in fact part of the Area, this would constitute a violation of article 137 and would bring the matter within the jurisdiction of the Chamber under article 187 since it concerned 'activities in the Area'. Consequently, the Authority could challenge the coastal State under article 187(b)(i), which states that the Seabed Disputes Chamber has jurisdiction in disputes with respect to activities in the Area, under Part XI and the Annexes relating thereto, 'between a State Party and the Authority concerning ... acts or omissions ... of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith.' It must be emphasised that non-parties to UNCLOS seem to be excluded from the jurisdiction of the Chamber because only acts or omissions of *State Parties* are mentioned in the provision.

4.2.5.2. Advisory Opinions

It may be asked whether the Authority or the CLCS can request an advisory opinion to clarify legal controversies regarding the establishment of the outer continental shelf. Eiriksson has asked whether 'under article 191 of the Convention, the Seabed Disputes Chamber could be approached by the Assembly or Council of the Authority

[688] Wolfrum (n 239) 29. Wolfrum seems to use the word 'delimitation' for both delimitations between adjacent and opposite States and delineations between the outer continental shelf and the Area; See also Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles' (n 296) 117.

[689] See article 187 of UNCLOS. According to article 1(3) of UNCLOS the term '"activities in the area" means all activities of exploration for, and exploitation of, the resources of the Area'.

for an advisory opinion'.[690] Article 191 provides that '[t]he Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency'.[691] Eiriksson points out that:

> The key jurisdictional element is that the request must relate to the scope of the activities of the Assembly or Council. It should be pointed out that here we would not be at the stage of actual or potential 'activities in the Area', a term with a specific and defined meaning, but rather at a more general stage, and what could be more relevant to activities of the organs of the Authority than disputes pertaining to their potential geographical scope? Practically speaking however, it cannot be envisaged that this would happen as an academic issue alone; that is, there would have to be some significant interest involved.[692]

Nelson has expressed a different opinion:

> '[A]ctivities' of the organs of the Authority must necessarily be confined to matter relating to 'activities in the Area', i.e. the exploration and exploitation of the resources of the international seabed area. If this line of reasoning is correct, the Seabed Disputes Chamber will not be able to give an advisory opinion on such delimitation issues.[693]

He notes however that 'it is for the Seabed Disputes Chamber to make such a determination'.[694] Nelson's view is supported by the *Area Case*.[695]

Eiriksson suggests that 'there could be recourse to an option introduced by the Law of the Sea Tribunal in article 138 of its Rules to allow for advisory opinions if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion'.[696] Eiriksson observes that '[t]he request would have to be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request'.[697] Nelson discusses another possibility. He states that '[w]hen certain specific requirements are met, the Assembly [of the Authority] shall request an advisory opinion from the Seabed Disputes Chamber as to whether "a proposal before the Assembly on any matters" conforms with the terms of the Convention

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[690] Eiriksson, 'The Case of Disagreement between a Coastal State and the CLCS' (n 293) 259.
[691] This was the route taken by the Council in the case regarding Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (Advisory Opinion) (The Seabed Dispute Chamber of ITLOS) (2011) 50 ILM 458 (*Area Case*).
[692] Eiriksson, 'The Case of Disagreement between a Coastal State and the CLCS' (n 293) 259.
[693] Nelson, 'Claims to the Continental Shelf Beyond 200-mile limit' (n 291) 577.
[694] Nelson, 'The Settlement of Disputes Arising from Conflicting Outer Continental Shelf Claims' (n 392) 417.
[695] *Area Case* (n 691) 465-6, paras. 31-45.
[696] Eiriksson, 'The Case of Disagreement between a Coastal State and the CLCS' (n 293) 259-60.
[697] Ibid 260.

(article 159, para. 10)'.[698] He is however not of the opinion that this applies to the Authority '[a]s the jurisdiction of the Chamber itself is restricted to matters relating to activities in the Area under Part XI and Annexes III and IV'.[699] Consequently 'the Chamber does not possess the competence to give an advisory opinion on matters concerning the delimitation between the outer continental shelves of coastal States and the international seabed area'.[700]

The answer to the question of whether the CLCS can ask for an advisory opinion is not straightforward. UNCLOS does not provide for the Commission to ask for an advisory opinion by any of the judicial fora mentioned in the Convention. It is possible, however, that another route is open to the CLCS. Before explaining this path, it must first be noted that the CLCS is not one of the organs of the UN or specialized agencies which have been authorised by the UNGA under article 96(2) of the UN Charter to request advisory opinions to the ICJ on legal questions arising within the scope of their activities. Moreover, there does not exist any direct procedural path for the CLCS to ask the UNGA to request an advisory opinion from the ICJ. As is well known, the UNGA has competence under the UN Charter to request the ICJ 'to give an advisory opinion on any legal question'.[701] It can be suggested that the Secretary-General could ask the UNGA to request the ICJ for an advisory opinion on legal question that was of vital importance to the CLCS. The reason why the CLCS should ask the Secretary-General rather than the Meeting of States Parties is that the Secretary-General provides the secretariat services for the CLCS, including legal services, as discussed in chapter three. The legal problems with which the CLCS is faced are likewise the legal problems that the Secretary-General is faced. Moreover, and more importantly, under the UNGA's Rules of Procedure the provisional agenda of a regular season of the UNGA shall include, among others, '[a]ll items which the Secretary-General deems it necessary to put before the General Assembly'.[702] UNGA is an important actor in the law of the

[698] Nelson, 'Claims to the Continental Shelf Beyond 200-mile limit' (n 291) 577; See also Wolfrum (n 239) 28-9.
[699] Nelson, 'Claims to the Continental Shelf Beyond 200-mile limit' (n 291) 577.
[700] Ibid.
[701] Article 96(a) of the UN Charter.
[702] Rule 13 (g) of the UNGA Rules of Procedure (n 309).

Sea.[703] It 'is the forum for general discussion on the law of the sea, including general problems of implementation of the Convention'.[704] Consequently, it has a direct interest in issues pertaining to the interpretation of the Convention and is likely to seriously discuss the need for an advisory opinion in this context. Even in the event that the UNGA requested the ICJ for an advisory opinion, the Court would have to decide whether it accedes to that request. As is well known, 'the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met'.[705] However, the Court has decided in its jurisprudence that only 'compelling reasons' lead to refusal in response to a request falling within its jurisdiction.[706] Although this situation may seem far-fetched it is nonetheless a real one that could be useful if a legal controversy arises over the CLCS which is difficult to solve by other available means.

4.2.5.3. Specially Affected Injured States

As noted above, State parties to UNCLOS enjoy standing before the judicial fora of Part XV of the Convention. Although all State parties enjoy standing it does not follow that all of them can invoke the responsibility of another State, in each case. According to article 42(a) of ILC's Draft Rules on the Responsibility of States for International Wrongful Acts[707] '[a] State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to ... [t]hat State individually'. The Commentary to the Draft Rules provides that '[f]or a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed'.[708] Noyes points out that '[a] specially affected state may invoke the responsibility of a coastal state for establishing outer limits in violation of the Convention's substantive or

[703] For instance, the Open-ended Informal Consultative Process on Oceans and the Law of the Sea, one of the most important fora for the law of the sea, was created by an UNGA resolution. UNGA Res 54/33 (24 November 1999) UN Doc. A/RES/54/33.
[704] Treves (n 351) 73.
[705] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep. 136, 156, para 44; See article 65(1) of the ICJ Statute.
[706] See *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) (2010) 49 ILM 1404, 1419, para. 30.
[707] Responsibility of States for Internationally Wrongful Acts. UNGA Res 56/83, annex (12 December 2001), U.N. Doc. 56/83/Annex.
[708] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, ILC Yearbook (vol. II, Part II) 119 (ILC Draft Articles on State Responsibility).

procedural requirements'.[709] He observes that '[i]f a coastal state has illegally determined the outer limits of its continental shelf, another state could be specially affected in a range of situations'.[710] He further provides that 'an opposite or adjacent state would be specially affected if a coastal state set outer limits that impinged on the claimant state's continental shelf'.[711] According to Wolfrum, a State in these circumstances 'undoubtedly may initiate legal action against the establishment of the outer limits of a continental shelf whether or not the outer limits were based upon a recommendation of the Commission or not'.[712] Another example could be taken of a coastal State's arrest of a vessel flying a foreign flag 'for violating the coastal state's continental shelf regulations just inside what the coastal state illegally claims as its outer limits line; in such a case, the arrest, which would violate rules of flag state jurisdiction, could be regarded as proximately resulting from the coastal state's breach of Article 76'.[713] The following statement of the ILA committee seems to be in line with the above considerations:

> [T]he Area and its resources are the common heritage of mankind as a whole, on whose behalf the ... Authority ... shall act, States individually have an interest in the exploration for and exploitation of the resources of the Area ... States can exercise certain high seas freedoms in the sea-bed and subsoil beyond the limits of national jurisdiction as specified in article 87 of the Convention. The existence of these high seas freedoms gives individual States a legal interest in the definition of these limits. A State may consider that these limits have not been established in accordance with the substantive or procedural requirements of article 76. This would constitute a dispute for the purposes of article 279 of the Convention.[714]

A related issue is whether third States enjoy *actio popularis* standing; i.e. whether any State 'may assert an interest of the international community in the common heritage of the Area and its resources and could judicially challenge a coastal state's outer limits'.[715] UNCLOS is silent on the issue. In the controversial *South West Africa Case,* ICJ rejected this type of standing as a rule of international law:

> [T]he argument amounts to a plea that the Court should allow the equivalent of an '*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as

[709] Noyes (n 266) 1246
[710] Ibid.
[711] Ibid 1246-7.
[712] Wolfrum (n 239) 27.
[713] Noyes (n 266) 1247.
[714] 2004 ILA Report (n 71) 783.
[715] Noyes (n 266) 1247; See also Nelson, 'The Continental Shelf' (n 254) 1251-2.

> imported by the 'general principles of law' referred to in Article 38, paragraph 1 (*c*), of its Statute.[716]

Noyes notes that '[t]his reluctance perhaps reflects concern that the doctrine could disrupt negotiated settlements between a state in breach of its obligations and directly injured states'.[717] It must be questioned whether the *South West Africa Case* is of much relevance in the context of the outer continental shelf. In the case the Court was dealing with a treaty dispute in which the applicant states were not parties to the relevant treaty. In the context of outer continental shelf disputes the applicant states will be parties to the applicable treaty, UNCLOS. The more recent *Question relating to the Obligation to Prosecute or Extradite*[718] case seems to be more relevant. In that case the ICJ stated:

> Any State party to the [United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984][719] may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes … and to bring that failure to an end.[720]

Since seabed rights have an *erga omnes* character, as discussed below, the question must be asked whether this dictum is also applicable to state parties to UNCLOS and disputes regarding the outer continental shelf that have an effect on the territorial scope of the international seabed. It seems likely.

A closely related question is whether states other than injured states can bring an action by referring to draft article 48 of the ILC's Draft Articles on State Responsibility, which concerns invocation of responsibility by a state other than an injured state.[721] Under draft article 48(1):

> Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole.

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[716] *South West Africa Cases (Ethiopia and Liberia v. South Africa)* (Judgement) (Second Phase) [1966] ICJ Rep. 6, 47, para. 88.
[717] Noyes (n 266) 1248.
[718] Question relating to the Obligation to Prosecute or Extradite Case *(Belgium v. Senegal)* (Judgement) 2012 <http://www.icj-cij.org/docket/files/144/17064.pdf accessed 2 January 2013 [Belgium/Senegal Case].
[719] Adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85.
[720] *Belgium/Senegal Case* (n 718) 29, para. 69.
[721] It has been pointed out that 'in reality "States other than injured States" are merely States which are injured differently; if their legal interests were not injured they would have no basis upon which they could invoke the responsibility of the responsible State.' Brigette Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet & Simon Olleson (eds.) *The Law of Internationally Responsibility* (Oxford University Press 2010) 193, 197.

According to article 48(2), the claimant state may claim cessation of the wrongful conduct and reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached.' In the *Area Case*, when discussing subjects entitled to claim compensation in matters concerning the Area, ITLOS made references to draft article 48 in support of the view that each State-Party to UNCLOS may 'be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area.'[722]

Wolfrum believes that draft article 48 is applicable for states other than injured states in a case regarding the delineation of the outer limits of the outer continental shelf. He has pointed out that the wording of draft article 48(1)(b) 'includes the initiation of proceedings for a judicial settlement'[723] and has argued the following:

> Limiting the scope of the Area inevitably means limiting the potential economic use by States. Thus, States defending the scope of the Area in the interest of the international community, may also act in their own interest. This aspect should ameliorate the concerns of those which hesitate to open the international dispute settlement system to what is considered the equivalent of an *actio popularis*.[724]

This indicates that ITLOS is of the opinion that draft article 48 is something more than *de lege ferenda*. It seems clear that treaty obligations *erga omnes partes* fall under draft article 48 and can be litigated regardless of whether there is any broader rule about an *actio popularis*. It must though be underlined that the likelihood that a state will challenge the outer limits of the outer continental shelf of another state without having direct political or economic interests for doing so is little.

In summary of what has been stated above about standing, references can be made to the work of Franckx:

> The determination of the outer edge of the continental margin extending beyond 200 nm, and thus indirectly the limits of application of the common heritage principle in the Area, remain basically a coastal state competence, which the participants in the UNCLOS III negotiations apparently did not want to share with any of the bodies they established within the framework of the 1982 Convention.[725]

This outcome 'leaves the international community ill-equipped to protect the common heritage of mankind, even in the location where the principle found its fullest exposition, namely the deep seabed'.[726]

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[722] *Area Case* (n 691) 54, para. 180
[723] Wolfrum (n 239) 30.
[724] Ibid 31.
[725] Franckx (n 8) 562.
[726] Ibid 563.

4.2.6. Are States obliged to wait for Recommendations from the CLCS before they seek to delimit the Outer Continental Shelf with Neighbouring States?

UNCLOS is silent on the issue of whether a State shall delineate the outer limits of its continental shelf beyond 200 nm before engaging in a maritime delimitation with a neighbouring State, *vice versa*, or whether there exists any 'temporal' requirement. In the *Bay of Bengal Case*, Myanmar submitted 'that as long as the outer limit of the continental shelf has not been established on the basis of the recommendations of the CLCS the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are'.[727] Moreover, Myanmar claimed:

> A review of a State's submission and the making of recommendations by the Commission on this submission is a necessary prerequisite for any determination of the outer limits of the continental shelf of a coastal State 'on the basis of these recommendations' under article 76 (8) of UNCLOS and the area of continental shelf beyond 200 [nm] to which a State is potentially entitled; this, in turn, is a necessary precondition to any judicial determination of the division of areas of overlapping sovereign rights to the natural resources of the continental shelf beyond 200 [nm] … To reverse the process ... to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance.[728]

Before rejecting Myanmar's arguments, ITLOS considered various issues, including the relationship between the CLCS and international courts and tribunals, the relationship between delineation and delimitation, State practice, decisions of international courts and tribunals and the Rules of Procedure. The *first* step of the Tribunal's analysis was to note:

> [T]he absence of established outer limits of a maritime zone does not preclude delimitation of that zone. Lack of agreement on baselines has not been considered an impediment to the delimitation

[727] *Bay of Bengal Case* (n 4) 103-4, para. 345

[728] Ibid 104, para. 345. Similar views have been expressed in academic publications. Kunoy has stated that 'the establishment of the outer limits of the continental shelf, to which there are overlapping claims, is subject to a two-step tango in which the recommendations of the Commission and a delimitation undertaken by an international adjudicative body are not only two separate steps, but also temporally differentiated, in that the second step should be taken subsequent to the first step'. Bjørn Kunoy, 'The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf' (2010) 25 IJMCL 237, 270. Serdy seems to be of the same opinion as Kunoy. He has stated: '[O]nce States have established the full extent of their continental shelves in line with the foregoing rules and process [article 76(1-9)], they are left free to delimit as they wish *inter se* any resulting overlap of those entitlements'. Serdy, 'The CLCS and its Disturbing Propensity to Legislate' (n 94) 360. See also Øystein Jensen, 'Towards Setting the Outer Limits of the Continental Shelf in the Arctic' in Davor Vidas (ed.) *Law, Technology and Science for Oceans in Globalisation – IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff 2010) 521, 535. Others have, however, expressed a contrary view. See Anderson, 'Maritime Boundaries and Limits' (n 656) 391; Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles' (n 296) 118.

> of the territorial sea or the [EEZ] notwithstanding the fact that disputes regarding baselines affect the precise seaward limits of these maritime areas.[729]

Thereafter, ITLOS pointed out that 'in such cases the question of the entitlement to maritime areas of the parties concerned did not arise'[730] and therefore in the dispute before it, it had to 'consider whether it is appropriate to proceed with the delimitation of the continental shelf beyond 200 nm given the role of the Commission'.[731]

The *second* step of the analysis was to discuss the relationship between the CLCS and international courts and tribunals. When doing so, ITLOS noted that the bodies of the institutional framework of UNCLOS are complementary in nature, as aforementioned.[732] Following that statement, the Tribunal pointed out that '[t]he right of the coastal State under article 76, paragraph 8, of the Convention to establish final and binding limits of its continental shelf is a key element in the structure set out in that article'[733] and that 'the Commission plays an important role under the Convention and has a special expertise which is reflected in its composition'.[734]

The *third* step of the analysis began with one of the key declarations of the judgement: 'There is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76.'[735] The Tribunal explained that '[u]nder the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries'.[736] On the other hand, '[t]he function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention, which include international courts and tribunals'.[737] Subsequently ITLOS stated: 'There is nothing in the Convention or in the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf

[729] *Bay of Bengal Case* (n 4) 110, para. 370.
[730] Ibid.
[731] Ibid para. 371.
[732] Ibid para. 373.
[733] Ibid 111, para. 374.
[734] Ibid para. 375.
[735] Ibid para. 376.
[736] Ibid.
[737] Ibid.

constitutes an impediment to the performance by the Commission of its functions.'[738] Thereafter, ITLOS mentioned the 'non-prejudice provisions', i.e. article 76(10) and article 9 of Annex II, to support its deliberation.[739]

The *fourth* step of the analysis was to briefly address the practice of States. On State practice the Tribunal stated: 'Several submissions made to the Commission, beginning with the first submission, have included areas in respect of which there was agreement between the States concerned effecting the delimitation of their continental shelf beyond 200 nm.'[740] It noted, however, that 'unlike in the present case, in all those situations delimitation has been effected by agreement between States, not through international courts and tribunals'.[741] It can be added to this discussion that States have concluded binding bilateral maritime boundary agreements in which the continental shelf beyond 200 nm is delimited prior to making a submission to the CLCS or receiving any recommendations from the Commission. More than a dozen such agreements[742] have been concluded, after the provisions of UNCLOS on the continental shelf beyond 200 nm were finalised. The majority thereof have been concluded by States party to UNCLOS. It must be emphasised that this practice has not been protested against by any State. Thus it appears that States had already tacitly accepted that maritime boundary delimitations by agreement and the establishment of the outer limits of the continental shelf are separate functions. This repeated practice by States 'constitutes objective evidence of the understanding of the parties as to the meaning of'[743] UNCLOS on this issue and should be taken into account when interpreting the Convention, according to article 31(3)(b) of the VCLT.[744] Since States have concluded agreements in which the continental shelf beyond 200 nm is delimited, without any involvement of the CLCS and without any protest from third States, it would have been illogical to deny States the possibility of deciding by agreement to submit a delimitation dispute regarding

[738] Ibid 111-2, para. 377.
[739] The Tribunal could also have mentioned article 134(4) of the Convention. See discussion on 'non-prejudice provisions' in chapter 3.6.1.
[740] *Bay of Bengal Case* (n 4) 112, para. 380.
[741] Ibid.
[742] The Agreements are discussed in chapter 5.5.2.
[743] VCLT Commentary (n 365) 221.
[744] Article 31(3)(b) of the VCLT provides: 'There shall be taken into account, together with the context: ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'

the outer continental shelf to an international court or tribunal before receiving a recommendation from the CLCS.

The *fifth* step in the Tribunal's analysis was to review the relevant jurisprudence of international courts and tribunals.[745] ITLOS mentioned that arbitral tribunals have indicated that they have jurisdiction in cases regarding the outer continental shelf. The Tribunal made reference[746] to the award in the *Barbados/Trinidad & Tobago Case*, which stated that the jurisdiction of the tribunal included 'the delimitation of a maritime boundary in relation to that part of the continental shelf extending beyond 200 nm'.[747] The arbitral tribunal did not, however, delimit the outer continental shelf since it decided that 'between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm'.[748] ITLOS also made reference to the *Nicaragua/Honduras Case* in which the ICJ provided:

> The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-State rights. It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.[749]

It must be emphasised that the parties in the *Nicaragua/Honduras Case* did not ask the Court to delimit the outer continental shelf and it is therefore obvious that the line could not extend more than 200 nm from the baselines. It is also obvious from article 76 that outer continental shelf claims must be reviewed by the CLCS. This statement cannot be read as implying that the ICJ decided that delineation must precede delimitation. Following its reference to the *Nicaragua/Honduras Case*, the Tribunal observed 'that the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case'.[750]

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[745] *Bay of Bengal Case* (n 4) 112, para. 381.
[746] Ibid 112-3, para. 382.
[747] *Barbados/Trinidad & Tobago Case* (n 4) 836, para. 217.
[748] Ibid 856, para. 368.
[749] *Nicaragua/Honduras Case* (n 213) 759, para. 319.
[750] *Bay of Bengal Case* (n 4) 113, para. 384. ITLOS could also have made reference to the *Guyana/Suriname Case* in which the Tribunal held that it 'was not invited to delimit maritime areas beyond 200 miles from the baselines of Guyana and Suriname ... Thus in the present cases the Tribunal is not concerned with matters concerning the delimitation of the outer continental shelf of the

In its *sixth* step of analysis, ITLOS considered paras. 2 and 5 of Annex I to the Rules of Procedure[751] and that CLCS had deferred consideration of the submission made by the two States.[752] The Tribunal pointed out that '[t]he consequence of these decisions of the Commission is that, if the Tribunal declines to delimit the continental shelf beyond 200 nm under article 83 of the Convention, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the Convention may remain unresolved'.[753] If this were to be the outcome, the parties would have to wait an indefinite period of time for the CLCS, and the CLCS would have to wait for an indefinite period of time for ITLOS. Or, in the words of Bangladesh, the outcome would have opened 'a jurisdictional black hole into which all disputes concerning maritime boundaries in the outer continental shelf would forever disappear'.[754]

Finally, ITLOS stated importantly that: 'A decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention.'[755] Consequently, ITLOS concluded:

> 392. In the view of the Tribunal, it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.
>
> 393. The Tribunal observes that the exercise of its jurisdiction in the present case cannot be seen as an encroachment on the functions of the Commission, inasmuch as the settlement, through negotiations, of disputes between States regarding delimitation of the continental shelf beyond 200 nm is not seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations.
>
> 394. For the foregoing reasons, the Tribunal concludes that, in order to fulfil its responsibilities under Part XV, Section 2, of the Convention in the present case, it has an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200 nm. Such

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Parties.' *Guyana and Suriname (Guyana v. Suriname)* (Arbitration Tribunal) (2007) 47 ILM 166, 215, para. 353 (*Guyana/Suriname Case*). These words can be interpreted as implying that the only reason the tribunal did not delimit the outer continental shelf was because it was not asked to do so.

[751] See discussion in chapter 3.6.

[752] *Bay of Bengal Case* (n 4) 113-4, paras. 385-9; See also CLCS/64 (n 377) 10, para. 40 and CLCS/72 (n 422) 7, para. 22.

[753] *Bay of Bengal Case* (n 4) 114, para. 390. In this context, ITLOS noted that the record in the case afforded 'little basis for assuming that the Parties could readily agree on other avenues available to them so long as their delimitation dispute' was not settled. Ibid.

[754] Ibid 107, para. 358.

[755] Ibid 115, para. 391.

> delimitation is without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention.[756]

It must be highlighted that the Tribunal was not of the opinion that it *could* adjudicate the dispute. It was of the opinion that it *had* to do so. It must be emphasised that later in the judgement the Tribunal stated that it 'would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question'.[757] What is meant by hesitance is in this context not clear. The statement seems to imply that in the event of *significant* uncertainty the Tribunal will not exercise its jurisdiction and will refrain from delimiting the disputed maritime area. Whether ITLOS is suggesting that states have to wait for recommendations from the CLCS, in such instances, before delimitating the area under consideration is neither clear. That interpretation could lead to the black hole situation where the parties would have to wait for an indefinite period for the CLCS, and the CLCS would have to wait for an indefinite period of time for an international court or tribunal. It is therefore more likely that the Tribunal is emphasising the importance for States of providing sound scientific and technical evidence to support its arguments before the Tribunal.

To summarise what has been stated above, ITLOS confirmed that delineation and delimitation are separate functions. This conclusion is supported by treaty law, State practice and the decisions of international courts and tribunals. The view that States must first delineate the outer continental shelf before delimiting it is thus rejected. States are not obliged to follow a certain path when establishing the outer continental shelf; in other words, States are free to choose whether they first follow the CLCS path or instead delimit the continental shelf with their neighbouring States.

It must be pointed out that the *Bay of Bengal Case* did not involve issues regarding the Area. If, however, the Area becomes an issue in a dispute, reference could be made to the decision of a Canadian domestic arbitral tribunal in a case between the Canadian provinces of Newfoundland and Labrador and Nova Scotia. Regarding the relationship between the act of delimitation and the international

[756] Ibid para. 392-4.
[757] Ibid 129, para. 443. The Parties did not disagree on the scientific aspects of the relevant seabed and subsoil. Ibid 121, para. 412.

community the court noted in a footnote that: '[T]here does not seem to be any difference in principle between the non-effect of a bilateral delimitation vis-à-vis a third state ... and its non-effect vis-à-vis the "international community" of third states generally.'[758] In other words, the international community, as represented by the CLCS and the Authority, is not involved in maritime boundary delimitations. In this context it can be noted that a court or tribunal could avoid fixing a tri-point with the Area by simply indicating a general direction for the final part of the maritime boundary and leaving it to the CLCS to indicate the outer limit of the continental margin. This has been done in a few negotiated maritime boundary delimitations.[759] By doing so, the court or tribunal fully respects the mandate of the CLCS and does not involve itself in the delineation of the outer limits of the continental shelf.

4.3. The Evaluation of Scientific and Technical Evidence by International Courts and Tribunals

4.3.1. Introduction

The evaluation of complex evidence is nothing new for international courts and tribunals. The ICJ, tribunals and other dispute settlement bodies have been faced with difficult scientific and technical questions and have not hesitated to rule on the issues in dispute. Sometimes the outcome has not been controversial.[760] In other instances, such as in the *Cameroon/Nigeria Case*, it has.[761] Since the entitlement criteria to the outer continental shelf are founded on geoscience, international courts and tribunals responsible for resolving a dispute involving the delineation or delimitation of the outer continental shelf will thus be faced with legal issues involving the consideration of complex scientific and technical evidence, such as in the *Bay of Bengal Case*. It will be asked below what is the meaning of scientific and technical evidence, whether scientific and technical complexities can be seen as a

[758] *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas as defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act* (Arbitration Tribunal) (Second Phase) (2002) 128 ILR 504, 538, fn. 90 (*Arbitration between the Canadian provinces of Newfoundland and Labrador and Nova Scotia*).
[759] See chapter 5.5.3.3.
[760] For instance in the *Black Sea Case* which was unanimously decided by the ICJ.
[761] See Anna Riddell & Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law 2009) 348-52; See also Clive Schofield & Chris Carleton, 'Technical Considerations in Law of the Sea Dispute Resolution' in Alex Oude Elferink & Donald Rothwell (eds.) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff 2004) 231, 239-49.

jurisdictional bar, what procedural methods exist to deal with complex scientific and technical issues, how deep the judicial assessment of scientific and technical findings of the CLCS will be and whether a court or tribunal can cope with complex scientific and technical data.

4.3.2. What is Scientific and Technical Evidence?

It is both hard to define scientific and technical evidence and to draw distinctions between the two because of their close interplay. Riddell and Plant have noted that '[b]oth terms are used in similar contexts in disputes involving elements that require explanations from specialized individuals or organizations in the wide-ranging fields of modern science and technology'.[762] Both types of evidence have in common the presentation of a problem which is essentially about 'to what extent specialized knowledge associated with such disciplines can be admitted and evaluated in international legal proceedings'.[763] Expert evidence is on the other hand, easier to define. By definition such evidence is 'given by persons with specialized knowledge on a subject to aid the Court in deciding the facts of the case. Often this will be on a relatively straightforward matter, but one which is simply not within the knowledge of the Court'.[764] That is not always the case. Riddell and Plant point out that:

> [O]ften the matters on which expert guidance is required are extremely complex where a case involves issues of science or technology. New developments and research mean these fields are constantly expanding and growing in complexity ... Not only are these cases harder ... to consider because they involve very complex subjects, but they are usually also highly politically sensitive matters …[765]

4.3.3. Scientific and Technical Complexity as a Non-Jurisdictional Bar

The need for consideration of highly complex scientific and technical evidence in a case before an international court or tribunal cannot be seen as a bar to jurisdiction. The ILA Committee has stated that '[a] review of the case law indicates that the ICJ and international tribunals do not consider that the complexity of scientific and technical data to be taken into account in addressing the legal issues is an impediment to the exercise of jurisdiction'.[766] For instance, in one of the most influential maritime boundaries cases – the *Libya/Malta Case* – the ICJ carefully studied the evidence concerning the relevance of certain geophysical and geological

[762] Riddell & Plant (n 765) 344.
[763] Ibid 344-5.
[764] Ibid 343-4.
[765] Ibid.
[766] 2004 ILA Report (n 71) 787.

features to establish the natural prolongation of the parties even although the Court eventually rejected the arguments which the data supported, for other reasons than that of jurisdiction.[767]

In the *Southern Bluefin Tuna Case* Japan argued that its dispute with Australia and New Zealand was concerned with questions of scientific judgement and therefore not justiciable.[768] Although the Tribunal did not rule on the question of admissibility it observed that 'its analysis of provisions of UNCLOS that bring the dispute within the substantive reach of UNCLOS suggests that the dispute is not one that is confined to matters of scientific judgment only'.[769] In the *St. Pierre and Miquelon Case* the tribunal implied that it would have looked at scientific and technical data, in the context of article 76 of the Convention, had the parties presented such data to it; which they did not.[770] Based on these three decisions it appears safe to assert that it must be highly unlikely that an international court or tribunal responsible for making a decision in a case regarding the establishment of the outer continental shelf will view complex scientific and technical questions as a bar that will prevent it from exercising jurisdiction. ITLOS, in the *Bay of Bengal Case*, was at least not afraid to face such complexities.

4.3.4. Procedural Methods to deal with Scientific and Technical Evidence

In the joint dissenting opinion of Al-Khasawneh and Bruno Simma in the *Case Concerning Pulp Mills on the River of Uuguay*, it is stated:

> The adjudication of disputes in which the assessment of scientific questions by experts is indispensable ... requires an interweaving of legal process with knowledge and expertise that can only be drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the Court …[771]

There are principally four different ways scientific and technical knowledge is put before a court or tribunal. *First*, by evidence submitted in writing or orally by the parties as part of their pleadings, i.e. *ex parte* evidence. Although this type of evidence is very important in all cases it is often seen as biased simply for the reason that it has been introduced by one party and the judges can never be sure about the

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[767] *Libya/Malta Case* (n 58) 36-7, para. 41.
[768] *Southern Bluefin Tuna (Arbitration)* (n 595) 1379, para. 40.
[769] Ibid 1391, para. 65.
[770] *St. Pierre & Miquelon Case* (n 678) 1172, para. 81.
[771] *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgement) (Joint Dissenting Opinion of Al-Khasawned and Simma) [2010] ICJ Rep. 108, 110, para. 3 (*Joint Dissenting Opinion of Al-Khasawned & Simma*).

impartiality of the experts that the parties either have called upon to give an opinion or are members of the delegation of a party before a court or tribunal, because they have been paid by the parties to support their arguments.[772] *Second*, by the questionable use of informal expert advice by so called 'invisible experts'. It can be argued that the use of such experts is not in the spirit of transparency and openness.[773] *Third*, by court-appointed experts who sit with the court or tribunal without the right to vote.[774] *Fourth*, by court-appointed individuals or bodies who have the task of carrying out an enquiry or giving an expert opinion.[775] The main legal aspects of court-appointed experts will be discussed below.

4.3.4.1. Scientific and Technical Experts

Article 289 of UNCLOS was designed to meet situations in which a court or tribunal is faced with complex scientific and technical questions. It reads:

> In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal but without the right to vote.

The Virginia Commentary provides the following observation regarding article 289:

> At the ninth and resumed ninth sessions (both 1980) [of the third Conference], it was pointed out that the experts to be appointed under article 289 are not ordinary experts acting as witnesses before the court or tribunal and presenting to the court or tribunal an expert opinion which may be challenged by any party and which may be contradicted by another expert opinion. The experts under article 289 are in fact 'assessors,' within the meaning of Article 30, paragraph 2, of the Statute of the [ICJ], which provides that the 'Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.' Such assessors sit with the court or tribunal during the proceedings and assist in the preparation of the judgement; their role is to ensure that the decision of the court or tribunal does not contain technical errors and conforms to the latest scientific knowledge with respect to the matter in dispute.[776]

It must be emphasised that there is no experience of the utilisation of assessors because '[n]o request or proposal for the appointment of assessors has been made before either the PCIJ or the post-war Court' and 'it is unclear in what respects they

[772] Christian Tams, 'Article 50' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds.) *The Statute of the International Court of Justice – A Commentary* (Oxford University Press 2006) 1109, 1111; See also Riddell & Plant (n 765) 339.
[773] See Tams, 'Article 50' (n 776) 1118; Riddell & Plant (n 765) 337-9.
[774] Such experts have not been appointed hitherto.
[775] *Corfu Channel (U.K. v. Albania)* (Judgement) [1949] ICJ Rep. 4, 9.
[776] Nandan & Sohn (n 588) 51.

differ from experts appointed by the Court'.[777] It has been suggested that the key difference is that, unlike experts, 'the assessor may participate in the private deliberations of the Court and in this fashion, presumably in the drafting of the Judgement'.[778] Given the technical complexities of most maritime delimitations it is a mystery why the Court has never appointed a technical expert to sit with the judges in delimitation cases.[779] If an expert were to be appointed, Schofield and Carleton have noted that his role should be to 'participate fully in preparatory work, the oral proceedings, the evaluation of evidence and the drafting of the judgement'.[780]

A few comments about article 289 must be made. *First*, article 289 is applicable before the ICJ, ITLOS and Annex VI and Annex VII arbitral tribunals. *Second*, there is only a minimum, no maximum, number of experts who can be selected. *Third*, courts or tribunals have discretion as to appointment.[781] However, 'the initiative for such an appointment can come from any party to the dispute or from the tribunal itself'.[782] On the other hand, the formal power to appoint experts rests with the court or tribunal. *Fourth*, prior to appointing the experts the court or tribunal shall 'consult all the parties to the dispute, presumably not only with respect to the question whether any appointment should be made, but also with respect to the persons to be selected'.[783] *Fifth*, it is important to make a clear distinction between experts called by the parties and those summoned by a court or tribunal, since the relationship between the latter and the judges 'is more intimate and their advice is not subject to analysis by the parties'.[784]

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[777] Hugh Thirlway, 'Article 30' in Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm (eds.) *The Statute of the International Court of Justice – A Commentary* (Oxford University Press 2006) 481, 493.
[778] Leo Gross, 'The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order' (1971) 65 AJIL 253, 278.
[779] See e.g. Clive Schofield & Chris Carleton (n 765) 252. The Registrar of ICJ has provided that 'cartographic experts are engaged by the Registry as short-term consultants who do not produce official reports. Such experts are charged with assisting the Court, individual judges and the Registry in studying cartographic materials submitted by the parties to cases, as well as in producing particular maps or chartlets'. David Anderson, 'Developments in Maritime Boundary Law and Practice' (n 184) 3220, fn. 88.
[780] Ibid 254.
[781] Nandan & Sohn (n 588) 50.
[782] Ibid 50-1.
[783] Ibid 51.
[784] Gudmundur Eiriksson, *The International Tribunal for the Law of the Sea* (Martinus Nijhoff 2000) 67.

The selection of individuals to sit in the court or tribunal with the judges is likely to be a focal point for the parties. It must be emphasised that article 289 states that experts should *preferably* be selected from the same lists from which the members of special tribunals are chosen. This means that it is not an obligation to select specialists from these lists. They can be selected from elsewhere, which is likely in outer continental shelf cases since the lists do not include specialists in geoscience or in other subjects relevant to continental shelf disputes.[785]

The question naturally arises as to whether individual CLCS members can be requested to sit with the court or tribunal under article 289 in their personal capacity.[786] In answering this question issues regarding confidentiality and impartiality must be discussed. Para. 4.4. of Annex II to the Rules of Procedure contains an important provision for confidentiality considerations. It provides that '[t]he members of the Commission shall not disclose, also after they cease to be members, any confidential information coming to their knowledge by reason of their duties in relation to the Commission'. Except where the classification of confidentiality has been lifted, by a submitting State, it could be difficult for a CLCS member, current or former, to respect its confidentiality obligation as a court-appointed expert.[787]

With regard to the question of impartiality, reference can be made to case law from the WTO Appellate Body. In one of the episodes of the so-called 'beef hormone trade disputes' between the European Communities (EC) and the USA, the question of the impartiality of scientific experts arose. The EC challenged before the Appellate Body the decision of a panel to appoint experts who had previously been involved in conducting risk assessments of the relevant hormones with the Joint FAO/WHO Expert Committee on Food Additives (JECFA).[788] The EC argued that the experts 'could not be independent and impartial because they were asked to

[785] See article 2(1) of Annex VIII of UNCLOS.
[786] It must be noted that this was not an issue in the *Bay of Bengal Case* since the Tribunal appointed neither any experts nor expert bodies to sit with the bench.
[787] See Suarez (n 23) 236.
[788] WTO, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Appellate Body* (14 November 2008) WT/DS320/AB/R; WTO, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Appellate Body* (14 November 2008) WT/DS321/AB/R.

evaluate risk assessments that were very critical of the JECFA reports'[789] and 'as co-authors of the JECFA reports, these experts cannot be considered to be independent and impartial in these circumstances, because this would amount to asking them to review and criticise reports that are their own doing'.[790] In its appeal, the EC argued that 'the consultation of experts by the Panel for the purposes of scientific and technical advice including their selection must respect general principles of law, and in particular the principle of due process'.[791] In addition, the EC argued 'that it is inherent in the principle of due process that the parties to a dispute are given a fair hearing including that the experts a court, tribunal or panel hears or consults are *independent and impartial*'.[792]

In response to these arguments the Appellate Body held that 'the protection of due process is an essential feature of a rules-based system of adjudication' and that '[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute'.[793] The Appellate Body went on to state that:

> Scientific experts and the manner in which their opinions are solicited and evaluated can have a significant bearing on a panel's consideration of the evidence and its review of a domestic measure, especially in cases like this one involving highly complex scientific issues. Fairness and impartiality in the decision-making process are fundamental guarantees of due process. Those guarantees would not be respected where the decision-makers appoint and consult experts who are not independent or impartial. Such appointments and consultations compromise a panel's ability to act as an independent adjudicator.[794]

The Appellate Body concluded that because the appointment of, and consultations with, the specialists compromised the Panel's ability to act as an independent adjudicator and infringed the EC's due process rights, this 'could, by itself, lead to the invalidation of the Panel's findings'[795] on the issues on which they consulted.[796]

If an international court or tribunal faced with the question of whether it should appoint a current CLCS member as a scientific or technical expert adopts a similar position to that of the Appellate Body, it should answer it negatively since the appointment could lead to all kinds of impartiality questions, especially if the expert

[789] Ibid 27, para. 65
[790] Ibid 27-8, para. 65.
[791] Ibid 27, para. 63.
[792] Ibid 177, para. 425.
[793] Ibid 180, para. 433.
[794] Ibid 181, para. 436.
[795] Ibid 202, para. 484.
[796] See ibid 201-2, paras. 482-4.

had previously commented on the relevant evidence in his work for the CLCS. It could however be argued that certain circumstances mitigate the impartiality aspects of appointing a CLCS member as an expert. For instance, a newly-elected CLCS member who has not taken part in any of the work of the CLCS could possibly be seen as eligible under article 289.

Different considerations apply to former members of the CLCS who have not been involved in any aspect of a submission, i.e. in cases when a State submits its submission to the CLCS after the former CLCS members left the Commission or before any substantive evaluation of the content of a submission took place. Suarez is of the opinion that '[f]ormer Commission members may be called upon to sit as experts but only in cases where they are not bound by the duty of non-disclosure of confidential information'.[797]

To answer the question of whether CLCS members can be requested to sit with a court or tribunal under article 289 of UNCLOS, it may be concluded that it is unlikely that, because of concerns about impartiality, a current CLCS member will be appointed to sit as an expert, with a court or tribunal. The situation is different in the case of a former CLCS member who has not been involved in a substantive evaluation of the scientific and technical evidence at issue in the case. It is however open for discussion whether it is more appropriate to involve experts from the IHO for instance, rather than a former CLCS member, to sit with the bench to minimise any suspicion of bias.

4.3.4.2. Court-appointed Individuals and Bodies

The principles concerning evidence obtained by the ICJ are found in articles 49 and 50 of the ICJ Statute. Article 49 provides the general power for the Court to request further documents and other information, such as information on questions of law or fact, whilst article 50 regulates a special form of obtaining evidence.[798]

According to article 50 '[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion'. The purpose of the provision is

[797] Suarez (n 23) 236.

[798] Christian Tams, 'Article 49' in Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm (eds.) *The Statute of the International Court of Justice – A Commentary* (Oxford University Press 2006) 1099, 1100.

to 'enable the Court to establish the facts of a case, and to understand complex technical and scientific information'.[799] In the joint dissenting opinion of Al-Khasawneh and Bruno Simma in the *Pulp Mills Case* it is noted that:

> The flexibility in the wording of article 50 of the Statute, for example, allows for recourse thereunder at any moment in the proceedings, which is especially noteworthy, as it means that the Article 50 procedure can be used from the very start of a dispute, during the written or oral phases, or even after the parties have appointed experts and that evidence is deemed unsatisfactory to the Court.[800]

Although the ICJ has often been faced with difficult scientific and technical data it has in most instances rejected requests for an expert opinion or inquiry.[801] The Court has only twice in its history sought independent advice – in the *Corfu Channel Case* and in the *Gulf of Maine Case*. In the latter case the Chamber accepted on the basis of article 50 the request of the parties 'to appoint a technical expert nominated jointly by the Parties to assist it in respect of technical matters and, in particular in preparing the description of the maritime boundary and the charts'.[802] It has been noted that article 50 'does not prescribe the evidentiary value attaching to expert opinions or inquiries. Just as with respect to all other pieces of evidence placed before it, the Court is free ... to evaluate the information in legal terms.'[803] However, 'experience, notably in the *Corfu Channel case*, suggests that detailed and well-prepared expert advice will not lightly be discarded'.[804] In this context, reference can be made to the Franco-Italian Commission in *Héritiers de S.A.R. Mgr. le Duc de Guise* award which provided that there was no reason to refrain from endorsing the conclusions of an appointed expert unless the expert's argument was inconsistent with the facts or rules of logic.[805] Riddell and Plant have suggested that the reason for the ICJ's reluctance to appoint experts is '[t]he risk of the Court feeling "bound" by an expert opinion given publicly'.[806] This 'has perhaps encouraged the private use of experts by the Court in its deliberations and in preparing judgements'.[807]

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[799] Tams, 'Article 50' (n 776) 1109.
[800] *Joint Dissenting Opinion of Al-Khasawned & Simma* (n 775) 112, para. 9.
[801] See Tams, 'Article 50' (n 776) 1112-3.
[802] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* (Order of 30 March 1984) [1984] ICJ Rep. 165, 166, para. 3.
[803] Tams, 'Article 50' (n 776) 1114.
[804] Ibid.
[805] *Différend Héritiers de S.A.R. Mgr. le Duc de Guise* – Decision No. 162 (1953) 13 RIAA 162, 168.
[806] Riddell & Plant (n 765) 334.
[807] Ibid.

Since article 50 states that the Court can entrust not only individuals but also bodies, bureaus, commissions, or other organisations to carry out an enquiry or to give an expert opinion, the question can be asked of whether the Court can ask the CLCS to carry out an enquiry or to give an expert opinion. In answering this question it must be borne in mind that it is not part of the function of the CLCS, as described in article 3 of Annex II of UNCLOS, to give courts and tribunals scientific and technical advice. The only scientific and technical advice the CLCS is supposed to provide is to coastal States during their preparation of the data needed for their submission to the CLCS following a request from that State. *Second*, the same considerations regarding confidentiality, mentioned in the context of the involvement of individual CLCS members under article 289, apply.

ITLOS' Rules contain a provision which is very similar to article 50 of the ICJ Statute. It provides that the Tribunal can arrange for an inquiry or an expert opinion if it considers this necessary.[808] With regard to Arbitral Tribunals it is up to each tribunal to determine its own procedure.[809] Consequently, the treatment of complex scientific and technical evidence is decided by the parties. Arbitral Tribunals have come up with various ways to handle scientific and technical data. For instance, in the *Iron Rhine Railway Case*, the Tribunal recommended that the parties establish a committee of independent experts to determine certain facts.[810] The experts were asked to 'investigate questions of considerable scientific complexity as to which measures will be sufficient to achieve compliance with the required levels of environmental protection'.[811] Another example can be taken from the *Guyana/Suriname Case*, in which the Tribunal appointed an independent hydrographic expert to serve the Tribunal and directed him as to the specific points of fact he was required to examine.[812]

[808] See article 82 of the Rules of the Tribunal (ITLOS/8) (Latest version adopted 17 March 2009) <http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf> accessed 16 July 2012. The registry of ITLOS has made arrangements with the IHO for cooperation of mutual concern. See Yearbook of the Tribunal 2002 (vol. 6) 54.
[809] Article 5 of Annex VII to UNCLOS.
[810] *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of Netherlands (Belgium v. Netherlands)* (2005) 27 RIAA 35, 120, para. 235.
[811] Ibid.
[812] See *Guyana/Suriname Case* (n 754) 180-1, paras. 120-1.

4.3.5. The Depth of Judicial Assessment of Scientific and Technical Findings of the CLCS

The question must be asked as to the depth to which international courts and tribunals will go in assessing the CLCS' scientific and technical findings in cases concerning the outer continental shelf. In principle, an international court or tribunal is 'not excluded from exercising its jurisdiction in contentious case between two States in which the validity of a decision of an international body is being impugned'.[813] On the other hand, UNCLOS 'charges the Commission specifically with evaluating the scientific and technical data submitted to it by a coastal State'.[814] Presumably, this to some extent limits the exercise of jurisdiction by international courts and tribunals concerning article 76, since the CLCS must under article 76 have discretionary powers to carry out its task.[815] ITLOS touched upon this issue in the *Bay of Bengal Case*:

> [A]s ... article [76] contains elements of law and science, its proper interpretation and application requires both legal and scientific expertise. While the Commission is a scientific and technical body with recommendatory functions entrusted by the Convention to consider scientific and technical issues arising in the implementation of article 76 on the basis of submissions by coastal States, the Tribunal can interpret and apply the provisions of the Convention, including article 76. This may include dealing with uncontested scientific materials or require recourse to experts.[816]

The Tribunal's dictum seems to indicate that it will not be shy to assess scientific and technical issues that are of importance for the interpretation and application of article 76. How far it is prepared to go is not clear. The final sentence of the dictum seems, however, to imply that ITLOS is not keen to evaluate contested scientific material. It is, on the other hand, questionable whether it is possible for ITLOS to avoid making such evaluations.

A related question is in which circumstances a court or tribunal can decide that the CLCS has misinterpreted the scientific and technical aspects of article 76. Noyes, Oude Elferink and the ILA Committee are of the opinion – in the words of the ILA Committee – that:

> A court or tribunal is competent to establish if the Commission has overstepped the bounds of its competence as defined in the Convention, applying a test of reasonableness. This test may lead to

[813] 2004 ILA Report (n 71) 785-6.
[814] Ibid 786; See also Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles' (n 296) 120.
[815] 2004 ILA Report (n 71) 786.
[816] *Bay of Bengal Case* (n 4) 120-1, para. 411.

> the conclusion that the Commission has acted within the limits of its competence or *ultra vires*, or that a decision is invalid for other reasons.[817]

The other reasons leading to the nullification of an act of an international entity can be:

> [P]rocedural irregularities and procedural impropriety in terms of a breach of principles of natural justice, of which *nemo judex in sua causa* [no-one should be a judge in their own cause] and *audi alteram partem* [hear the other side] are particularly noteworthy. Included in this general list is illegality in the sense of a breach of a rule of international law, including *jus cogens*, coercion, duress and corruption in the decision making process, abuse of power, lack of good faith, bias, material error and the absence of a statement of reasons for the decision.[818]

All these factors are in principle relevant in this context and can lead to the invalidity of CLCS recommendations. Regarding the consequences of the invalidity of a CLCS recommendation, the same considerations apply as will be discussed below.

4.3.6. Can an International Court or Tribunal cope with Complex Scientific and Technical Data?

As described above, courts and tribunals can make use of scientific and technical expertise in various ways. Although scientific and technical experts can be important for evaluating complex evidence, it is not they who take the decisions for the courts or tribunals, as clearly stated in the *Pulp Mills Case*:

> [D]espite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful considerations to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.[819]

Notwithstanding this optimistic view of the ICJ's competence to solve complex scientific issues, pessimistic views have been expressed about the capability of international courts and tribunals to cope with complex scientific and technical data in the context of article 76 of UNCLOS. John E. Noyes has stated the following:

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[817] 2004 ILA Report (n 71) 786; See also Noyes (n 266) 1249-52; Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles' (n 296) 121-2. It must be noted that Noyes and Oude Elferink were both members of the ILA Committee.

[818] Kaiyan Kaikobad, *The International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgements of the ILO and UN Administrative Tribunals* (Kluwer 2000) 36; See also Merrills (n 230) 105-6.

[819] *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010] ICJ Rep.14, 72-3, para. 168. A similar view is stated in the Dissenting Opinion of Judge *ad hoc* Ečer in the *Corfu Channel Case*: '[T]he Court is not bound by the opinion of experts. The Court may reject or accept it; but it must always give sufficient reasons.' *Corfu Channel (U.K. v. Albania)* (Assessment of the amount of compensation) (Dissenting opinion of judge *ad hoc* Ečer) [1949] *ICJ Rep*. 253.

> [E]ven if a court or tribunal could learn the data necessary to assess whether an outer limits line complied with the requirements of Article 76, it could be difficult for judges, even with the assistance of experts, to fairly evaluate and apply complex scientific data. When faced with the need to consider scientific and technical data, international courts and tribunals disclaim the existence of any formal bar to such consideration if necessary for a legal determination. However, if tribunals have to rule on such difficult technical issues as the sedimentary thickness test of Article 76(4)(a)(i) or the meaning of the 'foot of the continental slope' in Article 76(4)(b), they may have to, in the words of the [ICJ] [in the *Libya/Malta Case*], 'make a determination upon a disagreement between scientists of distinction as to the more plausibly correct interpretation of apparently incomplete scientific data.' If a court is to assess the legality of a particular outer limits line, it may not be able to escape the need to interpret scientific data, however, given the traditional judicial function of applying law to facts. In practice, the difficulties of addressing scientific and technical data may limit formal judicial challenges to coastal states' outer limits. States that contemplate judicial proceedings under the Convention's third-party compulsory dispute settlement provisions will be aware of the aforementioned difficulties, which may retard the bringing of outer limits claims.[820]

With regard, to maritime delimitations, Schofield and Carleton note that '[i]n third party dispute resolution it appears that technical evidence is less well integrated into the process of determining the course of maritime boundaries than is the case in bilateral negotiations'.[821] They point out that '[t]his lack of recourse to technical expertise and/or the absence, misunderstanding or mistreatment of technical evidence can lead to unfortunate results'.[822] Moreover they note that:

> When States submit a maritime boundary dispute to third party dispute resolution one of the key advantages of this step is, or should be, that they will, at the end of the process, be provided with certainty, clarity and finality as to the location of the boundary. The court or tribunal should ideally resolve the dispute in such a way that there is no scope for disagreement over technical issues, no need to go back to the court or tribunal for clarification so that the ruling can be effectively implemented.[823]

The parties should in this effort rely not only on the court or tribunal to solve various scientific and technical problems. Schofield and Carleton point out that 'it is up to the parties to a dispute to address the issues of supplying the court or tribunal with the technical evidence it requires to make a technically sound ruling'.[824]

Although an international court or tribunal will be faced with complex evidence in outer continental shelf litigation, the position taken here is that they are well equipped to respond to such issues by seeking the assistance of experts. That is not the problem. The real problem is not about capability. It is about whether

[820] Noyes (n 266) 1251-2.
[821] Schofield & Carleton (n 765) 239.
[822] Ibid.
[823] Ibid 249-50.
[824] Ibid 250.

international courts and tribunals will use the ammunition with which they are provided and whether they will do so in a transparent manner.

4.4. The Consequences of a Judgement for the CLCS

The consequences of a judgement, regarding the outer continental shelf obviously depends for the CLCS on whether it addresses issues of relevance for that body. There are a number of issues as to the interpretation or application of article 76 which have no bearing on the CLCS. The ILA Committee mentions the following examples:

> [T]he CLCS has no role in respect of the process of establishing the outer limits of the continental shelf once it has issued its recommendations and the coastal State has not made a new or revised submission. The Commission is not competent to indicate whether a coastal State has established the outer limits of the continental shelf *on the basis* of its recommendations. Similarly, the CLCS has no role in establishing what is meant by the phrase 'final and binding' in article 76(8) or the interpretation or application of article 76(9).[825]

On the other hand, other issues which a court or tribunal rules on will have consequences for the CLCS. The following examples are given by the ILA Committee:

> A judgment may find that an outer limit line is not final and binding on another State because it has not been established in accordance with article 76 of the Convention. Depending on the reasons for this finding, the coastal State may either have to redefine its outer limits or have to make a new or revised submission to the CLCS. A court or tribunal may also find that a recommendation of the CLCS is invalid. The consequences of such a finding are not altogether clear. The CLCS will not have been a party to the proceedings before the court or tribunal and will not be bound by its judgment. The Commission cannot revise its recommendations *proprio motu* in such a case. On the other hand, the outer limits of the continental shelf established by the coastal State on the basis of such invalid recommendations will not be opposable to other States. One way to deal with this issue would be for the coastal State to make a new or revised submission to the CLCS. A tribunal that has ruled on an issue will have indicated the reasons for its decision. In making its recommendations on the new or revised submission the Commission should take into consideration the reasons indicated by the Court.[826]

Nevertheless – and this is the key point – since a judgement only binds the parties before a court or tribunal, and the CLCS does not enjoy standing before international courts or tribunals, it cannot be formally bound by a judgement. From a narrow, formal perspective the consequences for the CLCS of a judgement, which addresses issues regarding article 76 and Annex II to UNCLOS, are nil. However, as has been noted: '[I]t would seem to be appropriate for the Commission to take it into account in the consideration of future submissions. Otherwise, the outer limits established on

[825] 2004 ILA Report (n 71) 785.
[826] Ibid 788-9; See also Oude Elferink, 'The Continental Shelf beyond 200 Nautical Miles' (n 296) 121-2.

the basis of the recommendations of the Commission are open to challenge on the same grounds as those indicated in an earlier judgment.'[827]

Finally, the question must be asked as to what the role of the CLCS will be in the verification of the submissions made by Bangladesh and Myanmar after the judgement in the *Bay of Bengal Case*. The Area was not an issue in the case, the outer limits of the States continental shelf; are defined by maritime boundaries and, as will be discussed in the next chapter, ITLOS accepted the parties' entitlement to the outer continental shelf without any CLCS involvement. Even if this was the outcome, it must be kept in mind that the Tribunal stated that 'the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries … is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf'.[828] This indicates that the CLCS will have to carry out its work as mandated. The CLCS will have to independently examine the data submitted by the two States in accordance with Article 76. Although the Tribunal accepted that the parties enjoy entitlement beyond 200 nm, it remains solely for the Commission to verify this on a technical basis. The Rules of Procedure should be followed without any exception, notwithstanding the Judgement. In principle, the end result will follow the same process that all states go through.

4.5. Concluding Remarks

Two questions were posed at the beginning of this chapter: 'What is the role of international courts and tribunals in disputes regarding the establishment of the outer continental shelf?' and 'are there any special factors regarding the outer continental shelf that limits the jurisdiction of an international court or tribunal?'

To answer the first question, the role of international courts and tribunals in outer continental shelf delimitations is mainly threefold; (1) to settle disputes between disputing parties regarding the delineation and delimitation of the outer continental shelf in accordance with the law; (2) to safeguard the holistic interpretation and application of international law and to save it from fragmentation; and (3) to contribute to substantive law-making. Another important task, with which

[827] 2004 ILA Report (n 71) 789.
[828] *Bay of Bengal Case* (n 4) 112, para. 379

international courts and tribunals are faced, in this context, is the evaluation of complex scientific and technical evidence. The position taken in this chapter was that courts and tribunals are fully capable of evaluating this type of evidence by using various procedural methods that are available to acquire the necessary scientific and technical expertise.

The answer to the second question is that the only factor that limits the jurisdiction of international courts and tribunals in disputes regarding the outer continental shelf, more than in other types of disputes in general, is the optional exception clause which excludes disputes regarding maritime boundaries from the compulsory procedures entailing binding decisions. This provision is only applicable, however, in maritime boundary delimitations – not delineations (unless the delineation is linked to a delimitation dispute). It must be strongly emphasised that the CLCS procedure does not affect the jurisdiction of a court or tribunal in a delimitation case and there certainly does not exist an obligation for States to first determine the outer limits of their continental shelf before they can proceed to delimitation with neighbouring States. Neither does the evaluation of complex scientific and technical evidence by international courts and tribunals have any effect on their jurisdiction.

This chapter supports the assertion that States are the masters of their own destiny in disputes regarding the establishment of the outer continental shelf. The Authority and the CLCS seem to play a very limited supporting role whilst the role of international courts and tribunals is in principle the same as in every other international dispute between States.

5. Delimitation of the Continental Shelf beyond 200 nm – The Method

5.1. Introduction

The delimitation of maritime boundaries is one of the more heavily litigated subjects of international law. Nevertheless, in only one case thus far has the outer continental shelf been delimited. As a result, many questions remain unanswered concerning maritime boundary delimitations beyond 200 nm. The main objective of this chapter is to shed light on the method that is applicable in boundary delimitations between neighbouring States involving the outer continental shelf. An attempt will be made to answer the question of whether the principles of the delimitation of the continental shelf beyond 200 nm are the same as those within 200 nm. The chapter will also try to answer the question of whether a rule of customary international law has emerged that is especially applicable in outer continental shelf delimitations.

The chapter is divided into two main parts. The first deals with the question of whether the equidistance/relevant circumstances method is applicable in outer continental shelf boundary delimitations before international courts and tribunals. This part analyses the different stages of the delimitation method established by international courts and tribunals. Furthermore, an attempt is made to fit various different aspects of the outer continental shelf into the method. The second part analyses negotiated agreements involving the outer continental shelf with the aim of identifying trends and differences in State practice. Prior to these two main parts, the question of whether there is an inner and outer continental shelf, in the context of boundary delimitations, will be addressed and subsequently an attempt is made to explain the main difference between negotiated and litigated maritime boundaries. The reason why the chapter addresses the rules applied by international courts and tribunals, in the absence of an agreement between States, before the treaty practice of States is because it is easier to clarify many complex concepts by first explaining their origin and how international courts and tribunals have developed them.

5.2. Is there an Inner and Outer Continental Shelf in Maritime Boundary Delimitations?

There is a clear distinction between the continental shelf within and beyond 200 nm in the delineation process, since the entitlement within 200 nm is based on distance,

whilst the entitlement beyond 200 nm is based on natural prolongation and has to be verified by the CLCS. Different opinions have been expressed as to whether this distinction applies also to the delimitation of the outer continental shelf. Two different schools of thought exist on how the delimitation of the continental shelf should be viewed.[829] One school finds 'that areas of outer shelf form an integral part of the (legal) continental shelf in all respects'.[830] The other school favours 'the view that such areas, forced by circumstances, constitute a sort of surplus of shelf, something extra, calling for special legal treatment, in particular in relation to delimitation'.[831] The latter opinion has been rejected.

In the *Bay of Bengal Case* ITLOS stated that 'Article 76 of the Convention embodies the concept of a single continental shelf'[832] and noted that '[i]n accordance with article 77, paragraphs 1 and 2, of the Convention, the coastal State exercises exclusive sovereign rights over the continental shelf in its entirety without any distinction being made between the shelf within 200 nm and the shelf beyond that limit'.[833] The Tribunal also pointed out that 'Article 83 of the Convention, concerning the delimitation of the continental shelf between States with opposite or adjacent coasts … does not make any such distinction'.[834] Finally, the Tribunal made reference[835] to the award in the *Barbados/Trinidad & Tobago Case* which held that 'in any event there is in law only a single "continental shelf" rather than an inner continental shelf and a separate extended or outer continental shelf'.[836] The award did not elaborate on the single continental shelf argument, because 'between Barbados and Trinidad and Tobago, there is no single boundary beyond 200 nm'.[837]

In this context, '[i]t may be useful to recall that the outer continental shelf has been with us all along'.[838]

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[829] Jørgen Lilje-Jensen & Milan Thamsborg, 'The Role of Natural Prolongation in Relation to Shelf Delimitation beyond 200 Nautical Miles' (1995) 64 NJIL 622, 630.
[830] Ibid.
[831] Ibid. Various reasons are given in support of this opinion, including the revenue sharing system of article 82, lack of generally accepted rules and different entitlement criteria.
[832] *Bay of Bengal Case* (n 4) 108, para. 361.
[833] Ibid.
[834] Ibid. See also 2002 ILA Report (n 68) 751.
[835] *Bay of Bengal Case* (n 4) 108, para. 362.
[836] *Barbados/Trinidad & Tobago Case* (n 4) 835, para. 213.
[837] Ibid 856, para. 368.
[838] David Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (2003) 96 AJIL 91, 102.

> It did not just appear with Article 76. Article 6 of the 1958 Continental Shelf Convention makes no distinction between broad continental shelves and narrow continental shelves, nor does the customary international law of maritime delimitation. Consequently, to think that the delimitation of the outer continental shelf arises only now in the context of Article 76 is a mistake.[839]

Although the continental shelf is a single unit it must be kept in mind that the revenue sharing arrangement of article 82 only applies to the outer continental shelf. It is also apparent that the entitlement criteria to the continental shelf within and beyond 200 nm are different, as explained in chapter two. Consequently, there are in law some differences between the continental shelf within and that beyond 200 nm.

5.3. The Difference between Negotiation and Adjudication in Maritime Boundary Delimitations

Most maritime boundary delimitations have been concluded by negotiations through political channels without the involvement of third parties.[840] This applies both to delimitations within and beyond 200 nm. The main reason for preferring negotiation over adjudication is that States engaged in negotiations are 'able to take into account human and resource conditions that have been ignored in boundaries settled through adjudication or arbitration'.[841] This flexibility – that of being able to take into account more variables – is the main difference between negotiation and adjudication in this field. International courts and tribunals cannot decide on the basis of the facts of a case without any reference to international law (unless empowered to act *ex aequo et bono*[842]). For courts and tribunals, the method is the essential link between the underlying facts and the eventual delimitation.[843] Oxman has noted that '[w]hen a tribunal is asked to decide a dispute regarding a maritime boundary under international law, the tribunal will limit itself to examining factors it regards as legally relevant to the resolution of the issues in dispute'.[844] For the judge, 'justice is not abstract justice but justice according to the rule of law'.[845] For States however, it is the end, not the means, which matters the most. The making of maritime

[839] Ibid.
[840] See e.g. Antunes (n 626) 3380. It has been noted that 'in practice negotiation is employed more frequently than all the other [dispute settlement] methods put together'. Merrills (n 230) 2.
[841] Klein (n 579) 255. Merrills notes that '[n]egotiation is a process which allows the parties to retain the maximum amount of control over their dispute; adjudication in contrast, takes the dispute entirely out of their hands'. Merrills (n 230) 16.
[842] See Article 38(2) of the ICJ Statute.
[843] See e.g. Weil, *The Law of Maritime Delimitation* (n 158) 114.
[844] Oxman, 'Political, Strategic and Historical Considerations' (n 162) 11.
[845] *Libya/Malta Case* (n 58) 39, para. 45.

boundaries is a 'fragmented practice that responds to the needs of states rather than conforming to any established format'.[846] Another factor which makes States favour negotiation more than litigation is that negotiations are in general less expensive.

In this context it must be noted that the judicial settlement of disputes is not incompatible with ongoing diplomatic negotiations. The ICJ has made clear that 'the fact that negotiations are being actively pursued during … proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function'.[847] This means that negotiations and litigation, regarding the same subject matter can take place at the same time.

Even although it is true that governments enjoy a large degree of contractual freedom in maritime boundary delimitations, there exist limitations. As discussed in chapter two, the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by *agreement* on the basis of *international law* in order to achieve an *equitable solution*. The reference to international law means that the boundary agreements can be based on whatever source of international law the negotiating parties choose to use. One source – the jurisprudence of international courts and tribunals – has had an especially strong impact on the law of maritime boundaries. Charney has noted:

> Developments in the jurisprudence strongly influence the course of interstate negotiations and the resulting delimitation agreements. Diplomats know that – more than for any other area of international law – resort to third-party dispute settlement is a real possibility for maritime boundary disputes. This awareness limits the positions they may credibly take during negotiations by devaluing those that would be untenable if presented for third-party dispute settlement. Based thus on circumscribed negotiating positions, the agreements reflect those restraints.[848]

Weil similarly stated that 'it is useful for [States] to have guidelines, so as to put the brake on excessive claims, discourage extreme positions and keep the discussion within reasonable limits'[849] and that 'States negotiating a delimitation agreement almost always try to base their claims on legal precedent and rarely fail to take the

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[846] Cissé Yacouba & Donald McRae, 'The Legal Regime of Maritime Boundary Agreements' in IMB 5 (n 184) 3281, 3304.
[847] *Application of the Interim Accord of September 1995 (The F.Y.R. Macedonia v. Greece)* (Judgement) 2011 <http://www.icj-cij.org/docket/files/142/16827.pdf> accessed 16 July 2012 [21-2, para. 57]; See also the *Aegean Sea Case* (n 57) 12, para. 29; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgement) [1980] ICJ Rep. 3, 20, para. 37.
[848] Charney, 'Progress in International Maritime Boundary Delimitation Law' (n 627) 228.
[849] Weil, *The Law of Maritime Delimitation* (n 158) 5-6.

law as a point of reference in their discussions and sometimes even in their agreements'.[850]

As discussed in chapter two, it is clear that under the law of international maritime boundary delimitations States are supposed to enter into negotiations. It is not as clear, however, which methods should be used to locate the boundaries. According to Oxman:

> The law of maritime delimitation may require the parties to negotiate in good faith. But it places few if any limitations on the location of an agreed boundary or related arrangements. Provided they agree, the parties are largely free to divide as they wish control over areas and activities subject to their jurisdiction under international law. They may be guided principally, in some measure, or not at all by legal principles and legally relevant factors a court might examine, and by a host of other factors a tribunal might well ignore such as relative power and wealth, the state of their relations, security and foreign policy objectives, convenience, and concessions unrelated to the boundary or even to maritime jurisdiction as such.[851]

Furthermore, it can be pointed out that '[a] government may accept a less favourable delimitation on one of its coasts in exchange for a more favourable delimitation on another coast, or for economic or political advantages in other fields'.[852] The possibilities for horse trade are many.

Interestingly, the practice of States in this field is to some extent similar to the practice of international courts and tribunals. Negotiations begin, in general, by considering an equidistance line as a starting point between the relevant States. The line is then modified if, for whatever reason, the States agree to do so.[853]

It must be emphasised that the validity of an agreement is not affected if the parties to it would for some reason reject equitable principles.[854] The consensual basis of the negotiation process leading to a binding agreement cannot by definition lead to the infringement of the goal of achieving an equitable solution. It must also be emphasised that 'the parties must consider the [boundary] line adopted to be equitable, otherwise they would not have subscribed to it'.[855]

One of the conclusions of the major research work carried out by the American Society of International Law on Maritime Boundaries is as follows:

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[850] Ibid 8-9. See also David Anderson, 'Recent Decisions of Courts and Tribunals in Maritime Boundary Cases' in IMB 6 (n 17) 4119, 4119.
[851] Oxman, 'Political, Strategic and Historical Considerations' (n 162) 11.
[852] Weil, *The Law of Maritime Delimitation* (n 158) 111.
[853] Ibid 154 & 206.
[854] Ibid 112.
[855] Ibid 111.

> [I]t appears from the [state] practice that the equidistant line has played a major role in boundary delimitation agreements, regardless of whether they concern boundaries between opposite or adjacent states. In the vast preponderance of the boundary agreements studied, equidistance has some role in the development of the line/or the location of the line that was established.[856]

For these reasons one could believe that this State practice would be seen as customary law that international courts and tribunals would use as an argument in support for the primacy of the equidistance line. This is not the case, however. It has been noted that 'this practice does not seem to be very instructive and, thus, is less influential than the adjudications'.[857] It has also been noted that:

> The collection of rules thus built by the courts has, however, only a limited field of application: it governs delimitation which States have submitted to judicial or arbitral settlement, but not those decided by governments themselves by agreement. The rules which make up the law of maritime delimitation do not have the character of *jus cogens*, binding on States, and allowing them no scope for derogation. In a word, although it binds the international judge or arbitrator, the law of maritime delimitation, as far as States are concerned, is no more than suppletive.[858]

The reason for the reluctance of international courts and tribunals to accept State practice as authoritive in this context may lie in the flexibility inherent in negotiations.[859] Another reason could be how difficult it can be to prove *opinio juris* from negotiated maritime boundary agreements since the parties thereto are not required to give any explanation as to why a certain boundary line was chosen. To summarise the above discussion, States enjoy more flexibility in negotiations deciding the method they wish to use to delimit their maritime boundaries than is enjoyed by international courts and tribunals. The aim in negotiation and adjudication is nevertheless the same: To reach an equitable solution on the basis of international law. From a general perspective this flexibility to choose different procedural paths to solve disputes regarding maritime boundaries, can be seen as evidence for '[t]he fact that international law rarely leaves the state with only one course of action' which 'is a great advantage for a system so bound up with politics and diplomacy'.[860]

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[856] Charney, 'Introduction' (n 22) xlii.
[857] Charney, 'Progress in International Maritime Boundary Delimitation Law' (n 627) 228; See also Weil, *The Law of Maritime Delimitation* (n 158) 113.
[858] Ibid 8.
[859] Ibid 113; See also Charney, 'Progress in International Maritime Boundary Delimitation Law' (n 627) 228.
[860] Martin Dixon, *International Law* (6th edn, Oxford University Press 2007) 12.

5.4. Is the Equidistance/Relevant Circumstances Method Applicable in Delimitation Cases regarding the Outer Continental Shelf?

5.4.1. The Method

As explained above, international courts and tribunals do not have a 'carte blanche to employ any method that it chooses in order to effect an equitable delimitation of the continental shelf'.[861] When a court or tribunal is asked to 'delimit the continental shelf or [EEZs], or to draw a single delimitation line, the Court proceeds in defined stages'.[862] The method consists of three separate stages with two preliminary issues that must be sorted out.[863] This process 'entails neither an unyielding insistence on mathematical certainty nor an unbounded quest for an equitable solution'.[864]

The first underlying issue is entitlement. It must be strongly emphasised that 'the starting point of any delimitation is the entitlement of a State to a given maritime area'.[865] If a State does not have the entitlement to the relevant area there will be no delimitation. The second issue, which relates to 'the very source of entitlement to maritime areas',[866] is to decide which coastal segments are to be taken into account for delimitation purposes.

The first step a court or tribunal takes in a maritime delimitation case is to 'establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place'.[867] The provisional line is one of equidistance[868] 'unless there are

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[861] *Anglo-French Case* (n 199) 114, para 245.

[862] *Black Sea Case* (n 56) 101, para. 115. The *Black Sea Case* was the first case in which the ICJ 'generically referred to a "delimitation methodology" which could be applied in cases dealing with the delimitation of the EEZ, continental shelf, or a single maritime boundary line'. Rothwell & Stephens (n 209) 388-9.

[863] Moreover, in some instances, preliminary to a delimitation, 'are questions of historic title, treaty obligations, common behavior and stability derived from the doctrine of *uti possidetis*' which must be answered. Charney, 'Progress in International Maritime Boundary Delimitation Law' (n 627) 234. Such preliminary considerations will not be addressed in this thesis.

[864] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)* (Judgement) (Joint Declaration of Judges *ad hoc* Mensah and Oxman) 2012 <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/6-C16.decl.Mensah-Oxman.orig.E.pdf> accessed 16 July 2012 [2].

[865] *Barbados/Trinidad & Tobago Case* (n 4) 837, para. 224.

[866] Ibid 837, para. 231.

[867] *Black Sea Case* (n 56) 101, para. 116; See also *Libya/Malta Case* (n 58) 46, para. 60; *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)* [1993] ICJ Rep. 38, 61, para. 51 (*Jan Mayen Case*); *Qatar/Bahrain Case* (n 232) 111, para. 230; *Cameroon/Nigeria Case* (n 233) 441, para. 288; *Bay of Bengal Case* (n 4) 76, para. 240.

[868] See e.g. *Barbados/Trinidad & Tobago Case* (n 4) 839, para. 242.

compelling reasons that make this unfeasible in the particular case'.[869] It must be emphasised that '[e]quidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to the delimited'.[870]

It is important to note that the base points used for the purpose of delineation are not necessarily the same as those used for delimitation purposes. The ICJ has stated:

> [T]he issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the [EEZ] and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the [EEZ] between adjacent/opposite States are two different issues.[871]

When a delimitation of maritime areas involves 'two or more States, the Court should not base itself solely on the choice of base points made by one of those parties'.[872] In these circumstances 'the Court must, when delimiting the continental shelf and [EEZs], select base points by reference to the physical geography of the relevant coasts'.[873] Moreover, these points need to represent the 'physical reality at the time of the delimitation'.[874] It must however be noted that '[m]ost maritime delimitations, both domestic and international, take as their starting point the baseline of the territorial sea'.[875]

At the first stage of the delimitation exercise 'the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data'.[876] At the second stage, courts and tribunals must 'consider whether there are factors calling for the adjustment or

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[869] *Black Sea Case* (n 56) 101, para. 116. Compelling reasons were found to exist in a case between Nicaragua and Honduras in which the Court ruled that with regard to the territorial sea it was 'facing special circumstances in which it cannot apply the equidistance principle'. *Nicaragua/Honduras Case* (n 213) 745, para. 281. These reasons were constantly changing relevant natural factors which made it impossible for the Court to identify base points from which to draw the equidistance line. Ibid 742-5, paras. 277-80.
[870] *Black Sea Case* (n 56) 101, para. 117.
[871] Ibid 108, para. 137; See also *Anglo-French Case* (n 199) 28, para. 19; 72, para. 139 & 74, para. 144.
[872] *Black Sea Case* (n 56) 108, para. 137; See also *Bay of Bengal Case* (n 4) 81, para. 264.
[873] *Black Sea Case* (n 56) 108, para. 137.
[874] Ibid 106, para 131.
[875] Louis Sohn, 'Baseline Considerations' in IMB 1 (n 22) 153, 154.
[876] *Black Sea Case* (n 56) 101, para. 118.

shifting of the provisional equidistance line in order to achieve an equitable result'[877] since 'equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case'.[878] These factors have, in delimitations within 200 nm, 'increasingly been attached to geographical considerations, with particular reference to the length and the configuration of the respective coastlines and their characterization as being opposite, adjacent or in some other relationship'.[879]

The aforementioned factors have been labelled 'special circumstances' or 'relevant circumstances'. Article 6 of the 1958 Continental Shelf Convention refers to special circumstances while in customary law the term used is relevant circumstances. In theory, the two concepts are different. The *travaux préparatoires* of the Geneva Convention indicate that special circumstances were to be understood in a narrow, restricted sense while relevant circumstances 'have always been understood as having a more broadly textured connotation, and of being potentially broader in scope'.[880] International courts and tribunals have casted doubts on the truth of this difference. The Tribunal noted in the *Anglo-French Case* that 'the different ways in which the requirements of "equitable principles" or the effects of "special circumstances" are put reflect differences of approach and terminology rather than of substance'.[881] Moreover, the ICJ noted in the *Jan Mayen Case* that:

> Although it is a matter of categories which are different in origin and in name, there is inevitability a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result.[882]

Maybe it is, after all, just a question of 'feel' as Evans has noted,[883] and not something that is of importance.

At the third and final stage of the delimitation process a court or tribunal will have to:

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[877] Ibid 101 para. 120; See also *Libya/Malta Case* (n 58) 46, para. 60; *Jan Mayen Case* (n 871) 61, para. 51; *Qatar/Bahrain Case*, (n 232) 111, para. 230; *Cameroon/Nigeria Case*, (n 233) 441, para. 288; *Barbados/Trinidad & Tobago Case* (n 4) 839, para. 242; *Bay of Bengal Case* (n 4) 76, para. 240.
[878] *Barbados/Trinidad & Tobago* (n 4) 839, para. 242.
[879] Ibid 838, para. 233.
[880] Evans (n 181) 146, fn. 46.
[881] *Anglo-French Case* (n 199) 75, para. 148.
[882] *Jan Mayen Case* (n 871) 62, para. 56.
[883] Evans (n 181) 146, fn. 46.

> [V]erify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line …[884]

ITLOS, in the *Bay of Bengal Case*, applied the three-stage method to the outer continental shelf.[885] It will be discussed below how the three-stage method is applied in the outer continental shelf and it will be argued that it could be applied differently beyond 200 nm from within 200 nm.

5.4.1.1. Entitlement

As stated above 'the starting point of any delimitation is the entitlement of a State to a given maritime area'.[886] It is clear that '[d]elimitation cannot be understood without title, which lies at its very heart ... [I]nternational law has turned to considerations relating to the legal basis of title, and has decided the criteria and methods for delimitation by reference to the legal concepts governing maritime jurisdictions.'[887]

> This theory is perhaps in some ways regrettable: it restricts the benefit of maritime jurisdictions to States enjoying access to the sea; it means the outer contours of their jurisdictions depend on the shape of their coastline; and, as a result, it causes the inequalities due to the combined hazards of political history and nature to be extended to maritime spaces ... So, although all States are equal in law, some of them are more equal than others as far as maritime jurisdictions are concerned.[888]

Nonetheless, the point of departure in all maritime delimitations is the entitlement of a State to a given maritime area.[889] The ICJ has provided that '"legal title" to certain maritime or submarine areas is always and exclusively the effect of legal operation. The same is true of the boundary of the extent of the title. That boundary results from a rule of law, and not from any intrinsic merit in the purely physical fact.'[890] The ICJ has also stated that '[i]t is only the legal basis of the title to continental shelf rights ... which can be taken into account as possibly having consequences for the claims of the Parties'.[891] When discussing the delimitation of the continental shelf, 'the definition given in paragraph 1 [of Article 76 of UNCLOS] cannot be ignored'.[892] According to this provision, the entitlement criteria to the continental shelf beyond

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[884] *Black Sea Case* (n 56) 103, para. 122; See also *Bay of Bengal Case* (n 4) 76, para. 240.
[885] *Bay of Bengal Case* (n 4) 132, para. 455.
[886] *Barbados/Trinidad & Tobago* (n 4) 837, para. 224.
[887] Weil, *The Law of Maritime Delimitation* (n 158) 49.
[888] Ibid 279.
[889] See *Bay of Bengal Case* (n 4) 117, para. 397.
[890] *Gulf of Maine Case* (n 172) 296, para. 103.
[891] *Tunisia/Libya Case* (n 40) 48, para. 48.
[892] Ibid para. 47.

and within 200 nm differ. Distance is the entitlement criterion within 200 nm whilst geoscience is completely immaterial.[893]

The ILA Committee has pointed out that 'the fact that the basis for entitlement to continental shelf and its delimitation are linked suggests that the process of delimitation may be different' within and beyond 200 nm.[894] Moreover, '[e]ntitlement to the EEZ and a continental shelf extending up to the 200 nautical mile limit is based on distance from the coast. This makes the distance criterion also an important consideration in the delimitation of these areas.'[895] However, '[d]istance does not play the same role in the establishment of entitlement over and the outer limit of the outer continental shelf. This may have an impact on the rules applicable to the delimitation of this part of the continental shelf.'[896] In this context it must be noted that the ICJ 'expressly held open ... the possibility that ... scientific natural prolongation arguments could be relevant for the delimitation of the outer continental shelf between neighboring States beyond the 200-nautical-mile zone'[897] in the Libya/Malta Case.

In the *Bay of Bengal Case*, ITLOS faced this issue. When discussing entitlement beyond 200 nm, ITLOS addressed the question of whether it could 'and should ... determine the entitlements of the Parties to the' outer continental shelf.[898] The Tribunal noted that it is necessary 'to make a distinction between the notion of entitlement to the continental shelf beyond 200 nm and that of the outer limits of the continental shelf'.[899] ITLOS emphasised that entitlement to the continental shelf does not depend on any procedural requirements and made reference to article 77(3).[900] Moreover, the Tribunal noted that '[a] coastal State's entitlement to the continental shelf exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present. It does not require the establishment of outer limits.'[901]

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[893] *Libya/Malta Case* (n 58) 35, para. 39.
[894] 2002 ILA Report (n 68) 751.
[895] Ibid 751-2.
[896] Ibid 752.
[897] David Colson, 'Delimitation of the Outer Continental Shelf Between States with Opposite or Adjacent Coasts' in Myron Nordquist, John Moore & Tomas Heidar (eds.) *Legal and Scientific Aspects of Continental Shelf Limits* (Martinus Nijhoff 2004) 287, 290; See also the discussion in chapter 2.3.2.
[898] *Bay of Bengal Case* (n 4) 118, para. 401.
[899] Ibid 119, para. 406.
[900] Ibid 120, para. 408.
[901] Ibid para. 409.

Consequently, 'the fact that the outer limits of the continental shelf beyond 200 nm have not been established does not imply that the Tribunal must refrain from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned'.[902]

ITLOS pointed out that '[a]s the question of the Parties' entitlement to a continental shelf beyond 200 nm raises issues that are predominantly legal in nature, the Tribunal can and should determine entitlements of the Parties in this particular case'.[903] Consequently, it rejected Myanmar's claim that 'the determination of the entitlements of both States to a continental shelf beyond 200 [nm] and *their respective extent is a prerequisite for any delimitation*'.[904] In this context it must be mentioned, as discussed in the previous chapter, that later in the judgement the Tribunal stated that it 'would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question'.[905] The position taken in the previous chapter was that this statement emphasises the importance for States of providing sound scientific and technical evidence to support its arguments before the Tribunal rather than suggesting that States have to wait for recommendations from the CLCS, in such instances, before delimitating the area under consideration.

5.4.1.2. Relevant Coastal Segments

It is import to decide which coastal segments are to have their configuration taken into account for delimitation purposes. Weil noted that the selection of the relevant segments should be simple '[s]ince delimitation presupposes an overlapping of projections, the relevant segments for delimitation purposes are those whose projections intersect projections from the other coast. Coastal segments whose projections do not overlap have no effect upon delimitation.'[906] In the *Anglo-French Case* the Tribunal stated that 'the method of delimitation ... must be one that has relation to the coasts of the Parties actually abutting on the continental shelf of that region'.[907] The ICJ provided in the *Tunisia/Libya Case* that:

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[902] Ibid para. 410.
[903] Ibid para. 413.
[904] Ibid 119, para. 405 (emphasis added).
[905] Ibid 129, para. 443.
[906] Weil, *The Law of Maritime Delimitation* (n 158) 72.
[907] *Anglo-French Case* (n 199) 115, para. 248.

> [F]or the purpose of shelf delimitation between the Parties, it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from ... consideration by the Court.[908]

Moreover, the Chamber of the Court in the *Gulf of Maine Case* provided:

> The involvement of coasts other than those directly surrounding the Gulf does not and may not have the effect of extending the delimitation area to maritime areas which have in fact nothing to do with it. It is ultimately only the concept of the delimitation area which is a legal concept, albeit one developed against the background of physical and political geography.[909]

Similarly, ITLOS, in the *Bay of Bengal Case*, pointed out that 'for a coast to be considered as relevant in maritime delimitation it must generate projections which overlap with those of the coast of another party'.[910]

5.4.1.3. The First Step — The Establishment of the Provisional Equidistance Line

As stated above, the first step a court or tribunal takes in an EEZ/inner continental shelf delimitation is to 'establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place'.[911] The reason why the equidistance method is tried first is 'not only because it is easy and objective and can be regarded, *prima facie*, as equitable because it divides the overlapping areas of the projections of the two coasts almost equally'.[912] The main reason is 'because it reflects the legal ideas at the root of the title of States to maritime areas and expresses the modern conception of maritime delimitation'.[913] In the same line of reasoning the Tribunal, in the *Barbados/Trinidad & Tobago Case*, stated that 'the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified'.[914]

Nevertheless, one author has argued that a judicial body should not embrace the provisional equidistance line in outer continental shelf delimitations since the ICJ stated in the *North Sea Case* that the continental shelf may be deemed actually to be 'part of the territory over which the coastal State already has dominion'.[915] This idea

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[908] *Tunisia/Libya Case* (n 40) 61, para. 75; See also *Gulf of Maine Case* (n 172) 337-8, para. 224.
[909] Ibid 272, para. 41.
[910] *Bay of Bengal Case* (n 4) 64, para. 198.
[911] *Black Sea Case* (n 56) 101, para. 116.
[912] Weil, *The Law of Maritime Delimitation* (n 158) 282.
[913] Ibid.
[914] *Barbados/Trinidad & Tobago Case* (n 4) 849, para. 306.
[915] See Bjørn Kunoy, 'The Rise of the Sun: Legal Arguments in Outer Continental Margin Delimitations' (2006) 53 NILR 247, 268. Kunoy is referring to the *North Sea Case* (n 26) 31, para. 43.

must be discarded. It must be emphasised that the Court did not differentiate between an inner and outer continental shelf since no distinction between these areas existed in law at that time. If this opinion was correct, the jurisprudence of the ICJ should show some signs of the rejection of the use of the provisional equidistance line in continental shelf delimitations within 200 nm. The ICJ has, however, not rejected it; it instead embraces the provisional equidistance line as a central part of the delimitation process.

As noted above the equidistance line is used as the provisional line unless there are compelling reasons that make the use of it unfeasible. In some instances, international courts and tribunals have deemed the use of the equidistance line to be inappropriate as the first step.[916] In these instances international courts and tribunals have turned to the angle-bisector method which focuses on macro-geography instead of micro-geographic features, as does the equidistance method. The ICJ first used it in the *Tunisia/Libya Case*,[917] then in the *Gulf of Maine Case*[918] and most recently in the *Nicaragua/Honduras Case*.[919] The arbitral tribunal in the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* also used it.[920] There is no reason to believe that this method cannot be employed by international courts and tribunals in outer continental shelf delimitations, although ITLOS rejected its applicability in the *Bay of Bengal Case*.[921]

The bisector method consists of two steps. First, the Parties' coasts facing the delimitation area are transformed into straight lines illustrating their general direction. Second, the angle created by these lines is bisected to yield the direction of the delimitation line. It must be emphasised that the drawing of an angle-bisector line, as the drawing of an equidistance line, is not necessarily the end of the process. If the angle-bisector method does not lead to an equitable solution it is subject to

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It must be highlighted that the author seems to have changed his opinion on this issue. See Bjørn Kunoy, 'A Geometric Variable Scope of Delimitations: The Impact of a Geological and Geomorphologic Title to the Outer Continental Shelf' (2006) 11 ARIEL 49, 74-5; Kunoy 'The Admissibility of a Plea' (n 732) 269.

[916] See *Nicaragua/Honduras Case* (n 213) 741, para. 272.

[917] *Tunisia/Libya Case* (n 40) 89, para. 129.

[918] See *Gulf of Maine Case* (n 172) 333, para. 213.

[919] *Nicaragua/Honduras Case* (n 213) 746-7, paras. 287-9.

[920] *Guinea/Guinea-Bissau Case* (n 153) 297, para. 108.

[921] *Bay of Bengal Case* (n 4) 75-6, paras. 235-40. One of the reasons for rejection was that the bisector line drawn by Bangladesh failed 'to give adequate effect to the southward projection of the coast of Bangladesh'. Ibid 75, para. 237.

modification.[922] ITLOS has provided: 'When the angle bisector method is applied, the terminus of the land boundary and the generalization of the direction of the respective coasts of the Parties from that terminus determine the angle and therefore the direction of the bisector.'[923] The Tribunal also pointed out that '[d]ifferent hypotheses as to the general direction of the respective coasts of the Parties from the terminus of the land boundary will often produce different angles and bisectors'.[924] The ICJ has stated:

> The use of a bisector ... has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate. The justification for the application of the bisector method in maritime delimitation lies in the configuration of and relationship between the relevant coastal fronts and the maritime areas to be delimited. In instances where ... any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method. Like equidistance, the bisector method is a geometrical approach that can be used to give legal effect to the 'criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States … converge and overlap' …[925]

Coming back to equidistance, Colson argued 'that positing the equidistant line as a starting point in the analysis of a delimitation of the outer continental shelf is a useful tool'.[926] Lilje-Jensen and Thamsborg stated similarly that 'the principle of equidistance ... is supposed to play a prominent part in future bi- and multilateral delimitation of enclaves of outer shelf'.[927] Because the entitlement to the outer continental shelf differs from the inner continental shelf, the question arises as to whether the location of the provisional equidistance line is affected by this fact.

It will be discussed below, from where the provisional equidistance line can be drawn in an outer continental shelf delimitation. Three possibilities will be presented; namely the coastal opening, the 200 nm limit and the foot of the slope. It must be emphasised that the discussion below does not cover a situation in which there are compelling reasons that make the use of the provisional equidistance line unfeasible.

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[922] See *Gulf of Maine Case* (n 172) 334-5, paras. 218 & 336-7, para. 222.
[923] *Bay of Bengal Case* (n 4) 75, para. 236.
[924] Ibid.
[925] *Nicaragua/Honduras Case* (n 213) 746, para. 287 (quoting *Gulf of Maine Case* (n 172) 327, para. 195).
[926] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 107.
[927] Lilje-Jensen & Thamsborg (n 833) 644.

a) The Coastal Opening

With regard to the EEZ/continental shelf it has been noted that 'the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it'[928] and consequently '[t]he coast of each of the Parties ... constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position'.[929] In other words, in EEZ/continental shelf delimitations coastal base points are used as the starting point of drawing the provisional equidistance line.

A preliminary question in this context is whether the coastal opening serves the same purpose for the provisional equidistance line beyond 200 nm as within 200 nm in a maritime boundary delimitation case before an international court or tribunal. If it is kept in mind that the two methods defining the outer edge of the continental margin, provided by article 76(4)(a) of UNCLOS, have in common that the outer edge of the continental margin is found through measurements from the foot of the slope and not from the coastal opening, it could be argued that the equidistance line should be measured from the foot of the slope, as discussed below. Nonetheless, in the *Bay of Bengal Case*, ITLOS reached the conclusion that the same method applied within and beyond 200 nm;[930] in other words the provisional equidistance line is to be drawn from the coastal base points within and beyond 200 nm. The reason for this is because the question of entitlement should, according to ITLOS, 'be distinguished from the question of the object and extent of those rights, be it the nature of the areas to which those rights apply or the maximum seaward limits specified in articles 57 and 76 of the Convention.'[931]

One might use as a supporting argument for the supremacy of the coastal opening – as the starting point for drawing the provisional equidistance line – that the constraining limits of article 76(5) of UNCLOS, on the maximum extent of the continental shelf, are measured from the territorial sea baselines. This argument must be rejected. These constraining limits do not create any rights. Their purpose is to

[928] *Tunisia/Libya Case* (n 40) 61, para. 73.
[929] Ibid para. 74.
[930] *Bay of Bengal Case* (n 4) 132, para. 455.
[931] Ibid.

limit the maximum area that can be claimed by a coastal State on the basis of the formulae of article 76(4); they have nothing to do with entitlement.

b) The 200 nm Limit

Lilje-Jensen and Thamsbourg introduced the idea of using the 200 nm limit as the 'coastal opening' for the continental shelf beyond 200 nm. Their idea is influenced by the fact that 'natural prolongation over the years has lost its power as governing principle of entitlement to shelf areas within 200 nm ... in favour of distance as determined on the basis of the coastal opening'.[932] It is also influenced by the alleged analogy that can be made between the 200 nm opening and the coastal opening, especially in cases where the continental shelf has been delimited up to 200 nm.[933] They predicted correctly that 'there is every reason to believe that a considerable number of States disregarding until further potential areas of outer shelf in front of their coasts, will already have delimited their shelf areas vis-à-vis the neighbours at the time when the future Commission is established and properly functioning'.[934] However, they argued that '[c]hoosing this approach the States concerned give indirect support to a two-stage solution of delimitation. At the same time they give preference to the idea of considering the outer shelf as a surplus of shelf calling for separate legal treatment.'[935] Moreover, they stated that:

> The fact that a given enclave of outer shelf is considered a featureless space being claimed by those States which have a 200 nm opening, long or short, to that enclave, suggests that the length of the opening should be given status of basic parameter (equitable principles) as to the allocation of shares of outer shelf to the individual claiming State.[936]

Lilje-Jensen and Thamsburg's idea is not rooted in the theory of maritime boundary delimitation since it is the natural prolongation from a coastal State's land mass – not the natural prolongation from the 200 nm limit – which is the basis for entitlement to the continental shelf beyond 200 nm. On the other hand, it must be noted that the natural prolongation of the continental shelf is only of relevance where the shelf does not extend beyond 200 nm.

[932] Lilje-Jensen & Thamsburg (n 833) 622.
[933] Ibid 639.
[934] Ibid 643.
[935] Ibid.
[936] Ibid.

c) The Foot of the Slope

As mentioned in chapter two, the CLCS views the foot of the slope as 'an essential feature that serves as the basis for entitlement to the extended continental shelf and the delineation of its outer limits' and that '[a]ccording to paragraph 4 (a) (i) and (ii) [of article 76 of UNCLOS], it is the reference baseline from which the breadths of the limits specified by formulae rules are measured'.[937] Some authors have argued that the base of the slope, or the foot of the slope, is also an essential feature for the delimitation of the continental shelf beyond 200 nm. The main argument used to support this view is that it is the foot of the slope – not the territorial sea baselines – which is the main factor with regard to entitlement in the process that leads to the establishment of the outer limits of the continental shelf beyond 200 nm.

As stated above, it is clear in continental shelf delimitations within 200 nm that 'the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it'[938] and therefore 'the coast of each of the Parties ... constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position'.[939] By analogy, it can be argued that 'the foot of the continental slope is the "decisive factor for title" to the outer continental shelf and consequently the foot of the slope "constitutes the starting line from which one has to set out in order to ascertain" the extent of the natural prolongation of the territory of one State'.[940] As a result, it could be expected that a provisional equidistance line, in outer continental shelf delimitation, reflects the accurate portion of each title to the area subject to dispute and that such a line should be conceived as departing from the foot of the slope points.[941]

The first to come up with the idea was Hollis Hedberg. In 1979 he wrote an article in *Science* where he discussed his Base-Slope-Boundary-Zone Formula,

[937] The Scientific and Technical Guidelines (n 84) 37, para. 5.1.1.
[938] *Tunisia/Libya Case* (n 40) 61, para. 73.
[939] Ibid para. 74.
[940] Kunoy, 'The Admissibility of a Plea' (n 732) 269.
[941] Ibid 268.

which according to him meets all delineation and delimitation needs.[942] Hedberg argued that:

> [T]he base of the slope (continental or insular) was not only the most prominent geomorphic marker worldwide on the ocean floor, but also that, as the outer edge of the continent or island, it was the most natural and appropriate line of division between the jurisdictional authority of the nations occupying the continents and islands and an international regime for the deep central oceans.[943]

According to Hedberg, '[t]he general guide to the location of national-international boundaries on the ocean floor should be the base of the continental (or insular) slope' because it 'forms the most distinctive and extensive natural division between areas of the ocean floor appropriate for national jurisdiction and those appropriate for international jurisdiction'.[944]

Hedberg was of the opinion that what he called 'restricted seas' – which are areas where there exist overlapping claims to the continental shelf – should be treated in a special manner. Hedberg advocated:

> In restricted seas [small enclosed or semienclosed seas, as contrasted with the major oceans ...], areas seaward of the base-of-slope should be divided in their entirety between the bordering countries on an equitable – usually median line – basis ... Examples are the Caspian Sea, Black Sea, Caribbean Sea, Mediterranean Sea, Labrador Sea, Bay of Bengal, Gulf of Mexico, Sea of Okhotsk, Bering Sea, and the Barents Sea. The purpose of the special treatment for small restricted seas is principally the practical one of avoiding the complication of having small 'nuisance' areas of international jurisdiction within them. Restricted seas would be officially designated as such after study and recommendations by the international marine boundary commission.[945]

His argument with regard to the Gulf of Mexico did not prevail in US political circles. Colson has pointed out that '[o]ne reason [for this] was that he believed the same formula could be used to divide the 200-nautical-mile zone. Another reason was that he did not appreciate the need for consistency in boundary practice between the United States and Mexico.'[946] Moreover, Colson asks:

> [W]as he so wrong to suggest that at least in some cases a median line between two lines marking the foot of the two continental slopes might be a more equitable solution than a median line between two coasts? The fact that the United States and Mexico agreed to apply the traditional equidistance method using coastal base points to delimit the Gulf of Mexico, including the western 'doughnut hole,' is a political fact, but it does not mean that Hedberg's idea was ill-considered.[947]

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[942] Hedberg (n 51) 136.
[943] Ibid 135.
[944] Ibid 136.
[945] Ibid. 137.
[946] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 104.
[947] Ibid.

Other authors have followed the footsteps of Hedberg and discussed the use of the foot of the slope for delimitation purposes. The shift from the base of the slope to the foot of the slope probably reflects the final outcome of article 76 of UNCLOS in 1982. The 2002 ILA Report suggested that the Committee tried to answer the following question in its future work:

> Does the foot of the continental slope provide an alternative baseline to establish an equidistance line. The reason for suggesting this option is that under article 76 of the LOS Convention the outer limit of the outer continental shelf is not linked directly to the baseline of the territorial sea, as is the case for the territorial sea and 200 nautical mile zones, but depends on the location of the foot of the continental slope.[948]

The Committee, however, neither answered the question nor did come up with any other criterion for the delimitation of the continental shelf beyond 200 nm in its subsequent reports. Based on Hedberg's theories, Colson stated in 2003 that the 'notion of an equidistant line based on the respective foot of each continental slope is not so far-fetched'.[949] In 2010, Kunoy stated the following:

> [I]nstead of drawing a provisional equidistance line, which has the baselines from which the breadth of the territorial sea is measured as its point of departure, after which it may be altered in the presence of special circumstances, a provisional equidistance line in outer continental shelf delimitations could be expected to reflect the accurate portion of each title to the area subject to dispute. By way of analogy it would seem fair to infer that the drawing of such a provisional line should be conceived as departing from the foot-of-the-slope points and onwards.[950]

In this context, it must be kept in mind that the foot of the slope points can be decided by two methods, as discussed in chapter two. According to the general rule, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base. The other method uses evidence to the contrary of the general rule. Theoretically speaking, it should not matter, for the selection of the provisional equidistance line, whether the foot of the slope points are decided on the basis of the general rule or by evidence to the contrary of the general rule. Practically speaking, if the CLCS has not confirmed (or rejected) the foot of the slope points which are based on evidence to the contrary to the general rule,[951] it can be expected that it could create more problems for an international court or tribunal to decide if it is justifiable to use the evidence to the contrary criterion.

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[948] 2002 ILA Report (n 68) 752.

[949] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 103.

[950] Kunoy, 'The Admissibility of a Plea' (n 732) 268.

[951] As discussed in chapter three, the CLCS can give its recommendations in disputed areas if all relevant parties agree on the involvement of the Commission. Such involvement is, however, not supposed to affect maritime boundary delimitations.

The suggestion could be made that the determination of the foot of the slope points for the purpose of measuring the breadth of the continental shelf should be governed by the same rules as the selection of the base points used for the same purpose in delimitations within 200 nm. That is, 'the Court should not base itself solely on the choice of base points made by one of the parties'.[952] This should apply equally to the foot of the slope points decided according to the general rule or the evidence to the contrary.

The question can be asked as to whether it is possible for a coastal State in an outer continental shelf delimitation to use foot of the slope points of a third party to support its claim to the continental shelf beyond 200 nm. The answer to that question is not clear. Some guidance can be found in the jurisprudence of the ICJ. The Court stated in the *Libya/Malta Case* that '[t]he capacity to engender continental shelf rights derives not from the landmass, but from sovereignty over the landmass'.[953] It can be asked how a feature – in this case the foot of the slope of a third State – over which a coastal State does not have sovereignty, can create title for the same State and be used in a delimitation. It seems far-fetched to answer the question in a positive manner. It must however be noted that it is possible that a submarine feature of a third State could be regarded as a relevant circumstance in outer continental shelf delimitations.

Although the usage of the foot of the slope as the starting point for drawing the provisional equidistance line in maritime boundary delimitations beyond 200 nm has a certain theoretical charm some significant problems arise from its usage. Its use could possibly have the effect of increasing the risk for conflict between decisions of courts and tribunals and the recommendations of the CLCS, given that they would both have to decide on the foot of the slope. Moreover, it is not clear where along the foot of the slope the starting point of the equidistance line should be located. It is also unclear, where the foot of the slope is seaward of the terminus of the boundary within 200 nm between adjacent states, what principles govern the boundary between such terminus and the foot of the slope. It could be suggested that the line within 200 nm should continue beyond 200 nm until it reaches the foot of the slope. This suggestion has however no connection with the roots of entitlement. Another issue

[952] *Black Sea Case* (n 56) 108, para. 137.
[953] *Libya/Malta Case* (n 58) 41, para. 49.

which is unclear is what the relationship is between the boundary within and beyond 200 nm where the foot of the slope is within 200 miles of the baselines? Although the answer is not crystal clear the only sensible way is to let the location of the foot of the slope have no impact until beyond 200 nm. Furthermore it must be noted that it is possible to read the judgement in the *Bay of Bengal Case* as rejecting the option of drawing the provisional equidistance line from the foot of the slope:

> [T]he equidistance/relevant circumstances method continues to apply for the delimitation of the continental shelf beyond 200 nm. This method is rooted in the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the [EEZ] and the continental shelf. *This should be distinguished from the question of the object and extent of those rights*, be it the nature of the areas to which those rights apply or *the maximum seaward limits specified in articles 57 and 76 of the Convention*.[954]

In defence of drawing the provisional equidistance line from the foot of the slope it must be noted that no state has asked an international court or tribunal to draw a provisional equidistance line from the foot of the slope. Consequently, no court or tribunal has had the opportunity to deal directly with the issue. On the other hand, the complexities and problems that follow the application of this method will probably have the effect that states will be reluctant to ask a court or tribunal to use the foot of the slope as the reference baseline.

5.4.1.4. The Second Step — Relevant Circumstances

As noted above, at the second stage of the delimitation exercise international courts and tribunals have to 'consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result'.[955] They will 'have to determine "the relative weight to be accorded to different considerations" in each case'.[956] The function of these considerations 'is to verify that the provisional equidistance line ... is not, in light of the particular circumstances of the case, perceived as inequitable. If such would be the case, the Court should adjust the line in order to achieve the "equitable solution"'.[957] In other words, considerations of equity come to play in this step of the delimitation process. In the *North Sea Case* the Court provided that:

> In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the

[954] *Bay of Bengal Case* (n 4) 132, para. 455 (emphasis added).
[955] *Black Sea Case* (n 56) 101, para. 120.
[956] *Jan Mayen Case* (n 871) 63, para. 58.
[957] *Black Sea Case* (n 56) 112, para. 155.

> balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[958]

Since the *North Sea Case*, international courts and tribunals have considered a variety of factors of which account should be taken, including coastal geography; seabed geology and geomorphology; seabed resources; living resources and ecology; considerations regarding security, navigation and jurisdiction; economic factors; and the practice of the parties. As stated above, 'geographical considerations, with particular reference to the length and the configuration of the respective coastlines and their characterization as being opposite, adjacent or in some other relationship'[959] have been the primary (almost the only) circumstances that courts and tribunals have deemed relevant enough to justify the relocation of the provisional equidistance line in delimitations within 200 nm. The reason for this lies in the strong relationship between entitlement and delimitation. Because it is the coastal opening that creates the entitlement for a coastal State within 200 nm, '[t]he delimitation line to be drawn in a given area will depend upon the coastal configuration'.[960] It must be emphasised that 'in some cases it appears necessary to both the courts and governments to ignore or to attenuate the effect of certain geographical features in order to ensure an equitable result which in their view, if these realities were fully taken into account would not be achieved'.[961] Or, as provided in the *North Sea Case*:

> [I]n certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:
> *(a)* The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.[962]

The primary examples of features that can possibly create inequalities are islands.[963] Consequently, some islands are ignored in maritime boundary delimitations; others,

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[958] *North Sea Case* (n 26) 50, para. 93.
[959] *Barbados/Trinidad & Tobago Case* (n 4) 838, para. 233.
[960] *Gulf of Maine Case* (n 172) 330, para. 205.
[961] Prosper Weil, 'Geographic Considerations in Maritime Delimitation' in IMB 1 (n 22) 115, 119.
[962] *North Sea Case* (n 26) 49, para 89(a).
[963] See e.g. Weil, *The Law of Maritime Delimitation* (n 158) 229. However, islands, rocks, reefs and low-tide elevations 'do not generally, as a matter of state practice, generate any entitlement to areas of continental shelf or economic zone'. Derek Bowett, 'Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations' in IMB 1 (n 22) 131, 131.

meanwhile, are given full or partial effect depending on the circumstances in each case.[964] For instance, in the *Libya/Malta Case* the ICJ decided that the uninhabited Maltese island Filfa should be disregarded altogether,[965] and in the *Tunisia/Libya Case* it gave only half-effect to the Kerkennah Islands although the main island is 69 square miles in area and has a population of 15,000 inhabitants.[966] In outer continental shelf delimitations, islands can have an especially distorting effect. In the *Bay of Bengal Case*, ITLOS rejected Bangladesh's claim to give effect to St. Martin in the delimitation of the EEZ and the continental shelf. When doing so ITLOS stated: 'The distorting effect of an island on an equidistance line may increase substantially as the line moves beyond 12 nm from the coast.'[967]

Since the entitlement to the outer continental shelf is based on natural prolongation considerations, it has been argued that geology and geomorphology should be of importance for outer continental shelf delimitations. In 1993, Keith Highet predicted that in outer continental shelf delimitations 'it is clear that geological and geomorphological factors will not merely be important; they will be of the essence'.[968] Colson predicted in 2003 that 'geological and geomorphological factors will reemerge in the law of maritime delimitation of the outer continental shelf ... Presumably, they will work together with the other facts in the case, perhaps prominently or perhaps not, depending on the circumstances, to achieve an equitable solution.'[969]Anderson stated in 2005 that '[g]eophysical and geomorphologic criteria retain their relevance beyond 200 n.m. as regards both entitlement to outer continental shelf and delimitation of boundaries with neighbors'.[970]

Although geoscientific factors may be of relevance beyond 200 nm it must be emphasised that there is no reason to believe that the majority of the jurisprudence of international courts and tribunals about the continental shelf within 200 nm is not directly applicable to the continental shelf beyond 200 nm. This includes

[964] See ibid 136-41.
[965] *Libya/Malta Case* (n 58) 48, para. 64.
[966] *Tunisia/Libya Case* (n 40) 89, para. 129; See also *Gulf of Maine Case* (n 172) 329-30, para 201; *Qatar/Bahrain Case* (n 232) 104-9, para. 219; *Black Sea Case* (n 56) 109-10, para. 149.
[967] *Bay of Bengal Case* (n 4) 96-7, para. 318.
[968] Keith Highet, 'The Use of Geophysical Factors in the Delimitation of Maritime Boundaries' in IMB 1 (n 22) 163, 196.
[969] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 107.
[970] David Anderson, 'Developments in Maritime Boundary Law and Practice' (n 184) 3214.

considerations regarding non-encroachment,[971] non-refashioning of nature[972] and the non-applicability of economic factors,[973] seabed resources[974] and security considerations.[975]

The case law of international courts and tribunals between 1969 and 1985 – the period when the general rules of delimitation were developed and when natural prolongation had not been rejected as a possible factor in the delimitation of the continental shelf within 200 nm – will be analysed below;[976] as also will the *Bay of Bengal Case* from 2012. The aim of this exercise is to identify circumstances that could be considered relevant for outer continental shelf delimitations. Furthermore, other possible relevant circumstances, which are grounded on article 76 of UNCLOS, will be suggested.[977]

a) The 1969 North Sea Case

In the first continental shelf case to come before the ICJ, the Court introduced two ideas which had great impact on subsequent litigation. These ideas are 'naturalness', that is the idea 'that the parties must seek to demonstrate that the area subject to overlapping or "competing" claims was "the more natural" extension of its landmass, rather than of the landmass of the other state';[978] and the impact that the interruption of troughs has on the natural prolongation of a coastal States continental shelf. The former idea is based on the following statement by the Court:

> [W]henever a given submarine area does not constitute a natural -or the most natural- extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;- or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.[979]

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[971] See chapter 5.4.1.5.
[972] See *North Sea Case* (n 26) 49-50, para. 91.
[973] See *Tunisia/Libya Case* (n 40) 77, paras. 106-7; *Gulf of Maine Case* (n 172) 342, para. 237; *Libya/Malta Case* (n 58) 41, para. 50; *Guinea/Guinea-Bissau Case* (n 153) 301-2, paras. 121-3.
[974] *Cameroon/Nigeria Case* (n 233) 447-8, para. 304.
[975] See *Libya/Malta Case* (n 58) 42, para. 51; *Jan Mayen Case* (n 871) 75, para, 81.
[976] The 1978 *Aegean Sea Case* and the 1981 *Jan Mayen Conciliation* (which was not a judgement or award) will not be addressed. In the *Aegean Sea Case*, the ICJ found that it did not have jurisdiction to address the case. *Aegean Sea Case* (n 57) 45, para. 109. Consequently, the focus of the Court was not on relevant circumstances. The conciliation commission on the Continental Shelf Area between Iceland and Jan Mayen (Norway) concluded that 'the concept of natural prolongation would not form a suitable basis for the solution of the outstanding issues'. *Jan Mayen Conciliation* (n 661) 822. Geological and geomorphological considerations were therefore not a factor in the conciliation.
[977] Some of the relevant circumstances discussed could also be used as evidence of lack of entitlement to the outer continental shelf.
[978] Highet (n 973) 168.
[979] *North Sea Case* (n 26) 31, para. 43.

One of the consequences of the naturalness criterion was that over the next 15 years parties litigating before international courts and tribunals tried to 'demonstrate that the area subject to overlapping or 'competing' claims was 'the more natural' extension of its landmass, rather than of the landmass of the other state'.[980] A few decades later, these considerations were picked up by Bangladesh in the *Bay of Bengal Case*, as will be discussed below.

In another section of the *North Sea Case* a reference is made to the Norwegian Trough, which is 'a belt of water 200-650 metres deep, fringing the southern and south-western coasts of Norway to a width averaging about 80-100 kilometres'.[981] This feature was ignored in a delimitation agreement between the UK and Norway. Instead equidistance principles were used although 'the shelf areas in the North Sea separated from the Norwegian Coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation'.[982] The reason for the judgement to mentioning this was to 'illustrate that states could choose, in delimiting their shelves, whether or not to take into account elements relating to natural prolongation'.[983] This reference 'paved the way for the passionate searches for troughs and faults and rift zones ... because of the implications of the idea that the Court expressed – the suggestion that such a feature *could*, one way or another, have been used as a boundary'.[984]

b) The 1977 Anglo-French Case

In the first litigated maritime boundary delimitation after the *North Sea Case*, the argument was made by the UK that there existed in the English Channel a trough or trench called the 'Hurd Deep' and the 'Hurd Deep Fault Zone' along the axis of which the Tribunal was asked to find a boundary as an alternative to the equidistant line.[985] The Tribunal answered the argument in the following manner:

> The geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the seabed and subsoil which do not disrupt the essential unity of the continental shelf either in the Channel or the Atlantic region. Indeed, in comparison with the deep Norwegian

[980] Highet (n 973) 168.
[981] *North Sea Case* (n 26) 13, para. 4.
[982] Ibid 32, para. 45.
[983] Highet (n 973) 170.
[984] Ibid.
[985] See *Anglo-French Case* (n 199) 59-61, paras. 104-9.

> Trough in the North Sea, they can only be regarded as minor faults in the geological structure of the shelf ... Moreover, to attach critical significance to a physical feature like the Hurd Deep-Hurd Deep Fault Zone in delimiting the continental shelf boundary in the present case would run counter to the whole tendency of State practice on the continental shelf in recent years.[986]

The above quoted text shows the impact of the reference to the Norwegian Trough in the *North Sea Case*. The *Anglo-French Case* was the first case in which a comparison between a trough, mentioned in a previous judgement of a court or tribunal, was an issue. Such comparison is seen in subsequent delimitations until 1985. Although geological or geomorphological factors were not used by the tribunal in the *Anglo-French Case* it did not reject them as a factor and kept open the possibility that such features could validly be used in more pronounced circumstances.

c) The 1982 Tunisia/Libya Case

In the *Tunisia/Libya Case*, the Parties used arguments based on geology, geomorphology and bathymetry to show that the disputed area was more naturally the prolongation of its landmass. Tunisia grounded its argument on bathymetry whilst the Libyan arguments were grounded on geology. Tunisia tried to show 'the steady "reflection" of the Tunisian coastline in the bathymetric patterns in order to demonstrate the "naturalness" of the asserted Tunisian prolongation eastward, rather than the "unnaturalness" of the asserted Libyan prolongation northward'.[987] Libya, on the other hand, 'asserted that the sub-marine areas in question were more naturally akin, geologically, to the southward-lying Libyan coast than they were to the westward-lying Tunisian coast'.[988] The Court treated these arguments as of possible relevance to the delimitation. It was, however, unable to view them as decisive in the particular factual circumstances given the characteristics of the specific submarine features relied on by the parties. The Court held:

> Those [features] relied on by Libya in support of its principal contention as to the geologically determined 'northward thrust' do not seem to the Court to add sufficient weight to that contention to cause it to prevail over the rival geological contentions of Tunisia; nor do they amount independently to a means of identifying distinct natural prolongations, which would in fact be contrary to Libya's assertion of the unity of the Pelagian Block. As for the features relied on by Tunisia, the Court, while not accepting that the relative size and importance of these features can be reduced to such insubstantial proportions as counsel for Libya suggest, is unable to find that any of them involve such a marked disruption or discontinuance of the sea-bed as to constitute an

[986] Ibid 60, para. 107.
[987] Highet (n 973) 173.
[988] Ibid.

> indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations.[989]
>
> The conclusion that the physical structure of the sea-bed of the Pelagian Block as the natural prolongation common to both Parties does not contain any element which interrupts the continuity of the continental shelf does not necessarily exclude the possibility that certain geomorphological configurations of the sea-bed, *which do not amount to such an interruption of the natural prolongation of one Party* with regard to that of the other, may be taken into account for the delimitation, as relevant circumstances characterizing the area ... In such a situation, however, the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be the elements of an equitable solution.[990]

The above quoted text seems to indicate that the geological and geomorphological factors relevant for delimitation must be of certain undefined minimum size. It also shows how the Court makes a clear difference between factors that are great enough to have impact on title and lesser factors which should be seen as relevant circumstances. Nevertheless, it did not place any weight on such factors.

d) The 1984 Gulf of Maine Case

In the *Gulf of Maine Case*, the US to a limited extent grounded its arguments on a geological/geomorphological natural boundary argument[991] – without success. The arguments were based on the separation between Brown Bank and Georges Bank by the Northeast Channel, which is in some places more than 200 metres deep, and was said to represent an equitable reflection of geographic reality confirmed by geological elements. When dismissing the geoscientific component of the case, the Chamber provided that:

> [W]ithin this single, uniform expanse of sea-bed it is possible to pick out features described as shelves, banks, basins, channels, and the Parties have given a detailed description of these, occasionally – and very cautiously – seeking in the existence of one or other of these geomorphological features some support for their respective positions. These are ultimately a somewhat insignificant body of rugosities …[992]
>
> Even the most accentuated of these features, namely the Northeast Channel, does not have the characteristics of a real trough marking the dividing-line between two geomorphologically distinct units. It is quite simply a natural feature of the area. It might also be recalled that the presence of much more conspicuous accidents, such as the Hurd deep and Hurd Deep Fault Zone in the continental shelf which was the subject of the Anglo-French arbitration, did not prevent the Court of Arbitration from concluding that those faults did not interrupt the geological continuity of that shelf and did not constitute factors to be used to determine the method of delimitation.[993]

[989] *Tunisia/Libya Case* (n 40) 57, para. 66.
[990] Ibid 58, para. 68 (emphasis added).
[991] See *Gulf of Maine Case* (n 172) 275-7, paras. 48-55.
[992] Ibid 274, para. 45.
[993] Ibid para. 46.

This case supported previous jurisprudence of the Court which held that geological and geomorphological factors have to be of a certain undefined minimum size. It is also an example where the sizes of troughs, which have been at issue in previous disputes, are compared. As in previous cases before the Court, these features were not deemed to be important enough to be seen as a relevant factor.

e) The 1985 Guinea/Guinea-Bissau Case

In the *Guinea/Guinea-Bissau Case*, the importance of natural prolongation for continental shelf delimitation was at issue. Guinea-Bissau argued that there was a separation of natural prolongation between the States. The physical characteristics invoked by Guinea-Bissau were not, however, deemed by the Tribunal 'to be sufficiently important to be taken as constituting a separation of the natural prolongations of the two States concerned'.[994] One reason for this conclusion was a lack of evidence.[995] These characteristics consisted of 'a series of underwater troughs, oriented in a north-east/south-west direction, 3 to 10 kilometers wide but never more than a few meters deeper than the shelf'[996] and the more pronounced underwater troughs of Konkoure and Soumbouya. Consequently, the continental shelf opposite the two States was considered to be one and the same.[997] The Tribunal importantly held that 'the Rule of natural prolongation can be effectively invoked for purposes of delimitation only where there is a separation of continental shelves'.[998] It elaborated upon this statement and noted:

> The characteristics of a continental shelf may serve to demonstrate the existence of a break in the continuity of the shelf or in the prolongation of territories of the States which are parties to a delimitation. However, if the continental shelf is assumed to be continuous, in the present state of international law no characteristic could validly be invoked to support an argument based on the rule of natural prolongation and designed to justify a delimitation establishing a natural separation.[999]

This case emphasised the significance of natural prolongation for the delimitation of the continental shelf and the importance of clear evidence – for a significant

[994] *Guinea/Guinea Bissau Case* (n 152) 300, para. 116.
[995] The Tribunal noted that 'the variations in the relief of the continental shelf in the present case and the variations in the nature of its terrain are not well enough known and above all not sufficiently characterized, to constitute valid separative factors, given the present state of research'. Ibid para. 117.
[996] Ibid 265, para. 22.
[997] Ibid 300, para. 117.
[998] Ibid para. 116.
[999] Ibid para. 117.

separation of the continental shelf – to prove that it is not the natural prolongation of a coastal State.

f) The 1985 Libya/Malta Case

The main seabed feature addressed in this case was called the 'Rift Zone'.

> [The Rift Zone] lies broadly to the south and south-west of the Maltese islands, and much closer to them than to the coasts of Libya. In this area is a series of deep troughs, running in a generally northwest-southeast direction, and reaching over 1,000 metres in depth, described on the International Bathymetric Chart of the Mediterranean as the 'Malta Trough', the 'Pantelleria Trough' and the 'Linosa Trough'. To the east of these troughs, and running in broadly the same direction, are two channels of lesser depth designated the 'Malta Channel' and the 'Medina Channel'. This 'rift zone' area lies towards the northern extremity of the Pelagian Block …[1000]

Libya held, whilst Malta rejected, that:

> [T]he rift zone indicate[s] the boundary zone between Libya's entitlement to areas of continental shelf to the north of the Libyan landmass and Malta's entitlement to areas of continental shelf to the south of the Maltese islands, either as constituting geologically a boundary between two tectonic plates, or simply as a geomorphological feature of such importance as to constitute a very marked discontinuity.[1001]

As noted in chapter two, the Court rejected arguments based on geology and geomorphology, mainly because of the development in international law, with the introduction of UNCLOS, that distance is the entitlement criterion and 'geological or geomorphological characteristics ... are completely immaterial'.[1002] Since 1985, the impact of geology and geomorphology has in the case law of maritime delimitations within 200 nm been a non-issue. That is until 2011 when the *Bay of Bengal Case* litigation took place.

g) The 2012 Bangladesh/Myanmar Case

In the *Bay of Bengal Case*, Bangladesh claimed that the relevant circumstances beyond 200 nm 'include the geology and geomorphology of the seabed and subsoil, because entitlement beyond 200 nm depends entirely on natural prolongation while within 200 nm it is based on distance from the coast'.[1003] It noted that 'its entitlement to the continental shelf beyond 200 nm "rests firmly" on the geological and geomorphological continuity between its land territory and the entire seabed of the Bay of Bengal'.[1004] Bangladesh claimed that Myanmar 'at best enjoys only geomorphological continuity between its own landmass and the outer continental

[1000] *Libya/Malta Case* (n 58) 34-5, para. 37.
[1001] Ibid 35, para. 38.
[1002] Ibid para. 39.
[1003] *Bay of Bengal Case* (n 4) 132, para. 457
[1004] Ibid.

shelf'.[1005] Consequently, Bangladesh argued that 'an equitable delimitation consistent with article 83 must necessarily take full account of the fact that Bangladesh has the most natural prolongation into the Bay of Bengal, and that Myanmar has little or no natural prolongation beyond 200 nm'.[1006] Myanmar, on the other hand, claimed that there were no relevant circumstances for the outer continental shelf to be taken into account.[1007]

The Tribunal held 'that "the most natural prolongation" argument made by Bangladesh' had no relevance for the case since it had 'already determined that natural prolongation is not an independent basis for entitlement and should be interpreted in the context of the subsequent provisions of article 76',[1008] especially para. 4 which mainly contains references to geomorphology, not geology. It had already held that both parties were entitled to the outer continental shelf and consequently it could not 'accept the argument of Bangladesh that, were the Tribunal to decide that Myanmar is entitled to a continental shelf beyond 200 nm, Bangladesh would be entitled to a greater portion of the disputed area because it has the most natural prolongation'.[1009]

The conclusion of the Tribunal seems to bring an end to the quest for naturalness in maritime boundary jurisprudence. Moreover, it rejects geology as a relevant circumstance for the delimitation of the outer continental shelf; in other words, geology is completely immaterial beyond 200 nm. This conclusion makes perfect sense *if* one accepts that natural prolongation is not an independent concept. It must be emphasised that ITLOS did not reject the possible importance of the location and size of troughs or other geomorphological features, since they were not an issue in the case. Consequently, geomorphological factors have not been decided completely immaterial, as a possible relevant circumstance, for outer continental shelf delimitations.

h) Other Considerations for Outer Continental Shelf Delimitations

In the ILA Committee's 2002 Report the following question is addressed:

[1005] Ibid.
[1006] Ibid.
[1007] Ibid 133, para. 459.
[1008] Ibid para 460.
[1009] Ibid.

> Can all situations involving the delimitation of the outer continental shelf be treated similarly or is it necessary to distinguish between different situations, depending on the location of the outer limit line. For instance, there may be a difference between a situation in which both states have a continental shelf up to a distance of 350 nautical miles and a situation in which a continental shelf with an outer limit at 350 nautical miles overlaps with a continental shelf with an outer limit beyond that distance.[1010]

As mentioned in chapter two, there may in some areas be a choice between different outer limit lines applying article 76(4-5) of UNCLOS. Only the coastal State has competence to make such a choice. Since there is no hierarchy involved in the selection of the formulae and constraining lines, so long as the relevant seabed fulfils the criteria laid down in article 76, and there is no difference with regard to entitlement between them, it must be questionable if the use of different formulae in an area with overlapping claims can be seen as a relevant circumstance.

It has however been suggested that a continental shelf claim constrained by the limitations of article 76(5) is a stronger claim than one constrained by article 76(6), especially a claim grounded on the Irish formula. The main difference between such claims is that the former involves seafloor features that are natural components while the latter involves 'seafloor features that are not natural components but nevertheless an integral part of the continental margin'.[1011]

> To the extent that an overlapping area between two opposite coastal States exist in which coastal State A fulfils the test of appurtenance by virtue of national component while opposite coastal State B fulfils the same only on the basis of an integral part of the continental margin, the former would arguably be stronger than the second with regards to the sovereign rights to the disputed area. A natural component of the continental margin being susceptible to generate sovereign rights to the continental shelf far beyond 350 nm from the baselines from which the breadth of the territorial sea is measured is undeniably a stronger title to the disputed area than the title whose extension terminates at 350 nm from the baselines from which the breadth of the territorial sea is measured. It is likely that, to the extent of the two coastal States would have overlapping claims, the difference of titles could be a special circumstance in the partition of the disputed area.[1012]

Since ITLOS, in the *Bay of Bengal Case*, underlined that the natural prolongation concept should be interpreted in the light of article 76(4), it could be argued that the thickness of sedimentary rocks should be seen as a relevant circumstance when the Irish formula is applied by both parties to a delimitation. Following this line of reasoning, an international court or tribunal should compare the thickness of the sedimentary rocks of the parties to the delimitation and decide that the party with thicker sedimentary rocks has a stronger claim to the outer continental shelf.

[1010] 2002 ILA Report (n 68) 752.
[1011] Kunoy, 'A Geometric Variable Scope of Delimitations' (n 919) 75.
[1012] Ibid.

Consequently, it should be seen as more entitled to the disputed area and be given a larger slice thereof.

China has used the origins of sediments covering the continental shelf to support its claims 'to the continental shelf out to silt line in the Yellow Sea. This line indicates the limit of sediment brought to the sea by Chinese rivers of which the Huang Ho (Yellow River) is best known and carries the largest load of sediment.'[1013] Moreover, some of the 1986 negotiated maritime boundary between Burma (Myanmar) and India in the Andaman Sea, Coco Channel and Bay of Bengal draws a line that is supposed to reflect arguments concerning the deposit of sediments by the Irrawaddy River from Myanmar.[1014] In the *Bay of Bengal Case* the question arose as to the relevance of the origin of sediments. ITLOS rejected Bangladesh assertions that the origin of sedimentary rocks had any significance for 'the interpretation and application of article 76 of the Convention'.[1015] It noted that 'article 76 of the Convention does not support the view that the geographic origin of the sedimentary rocks of the continental margin is of relevance to the question of entitlement to the continental shelf or constitutes a controlling criterion for determining whether a State is entitled to a continental shelf'.[1016] If the origin of sediments criterion were to have been accepted, it could justify absurd claims, such as that a landlocked State which a river passes through, that finally ends in the ocean, should be granted a part of the outer continental shelf because sediments originate in that State.

i) Previously Decided Boundary Agreements Within 200 nm

It may be asked whether any consequences follow from a previous delimitation of an inner continental shelf with (most likely) an adjacent State before the continental shelf beyond the 200 nm limit is delimited and, if so, what is its effect. It has been noted that 'it is obvious that the 200 nm point of the inner shelf boundary must coincide with the point of departure of the corresponding outer shelf boundary between the States two by two'.[1017] However, '[t]he direction of the line in the transition point between the inner and outer shelf … needs not necessarily be the

[1013] Victor Prescott, 'Burma (Myanmar)-India' Report Number 6-3 in Jonathan Charney & Lewis Alexander (eds.) *International Maritime Boundaries* vol. II (Martinus Nijhoff 1993) 1329, 1334 (hereinafter IMB 2).
[1014] Ibid 1333-4.
[1015] *Bay of Bengal Case* (n 4) 130, para. 447.
[1016] Ibid.
[1017] Lilje-Jensen & Thamsborg (n 833) 643.

same'.[1018] One of the consequences of a previous delimitation within 200 nm for a delimitation beyond 200 nm could be less flexibility compared to a delimitation of the continental shelf as a whole. A previously decided boundary within the 200 nm limit can, on the other hand, also ease the delimitation that is left, whereas there is less to decide upon in such a case.

j) Relevant Circumstances for a Provisional Equidistance Line Drawn from the Foot of the Slope

If for some reasons an international court or tribunal accepts to draw the provisional equidistance line from the foot of the slope, the question arises as to whether there are any specific relevant circumstances that could possibly affect the drawing of the line other than those already discussed.

As mentioned above, some islands are discounted in maritime delimitations, whilst others are given full or partial effect depending on the circumstances in each case, for the reason that they can create inequalities. It could be argued that foot of the slope points creating inequalities should be treated in the same way and should be given no effect or partial effect. However, a major difference exists between islands and the foot of the slope points. The foot of the slope forms an integral part of the natural prolongation of the landmass. In this context it serves the same purpose as the coastal front. Islands are, on the other hand, usually separated from the mainland (except in the case of sovereign island States) and can therefore generally be seen as less important features than the coastal front of the mainland. Consequently, one might argue that there is no analogy between ignoring or reducing the effect of a foot of the slope point, on the other hand, and ignoring or reducing the effect of an island, on the other. One might even argue that ignoring or reducing such an important submarine feature would constitute the refashioning of nature and should therefore be rejected as a possibility in outer continental shelf delimitations.

5.4.1.5. The Principle of Non-Encroachment

A related consideration to relevant circumstances is the problem of encroachment which was the core issue in both the *North Sea Case* and the *Bay of Bengal Case*. The problem was explained in the following manner in the *North Sea Case*:

> [I]n the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the

[1018] Ibid.

> configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two ... What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length.[1019]

Colson pointed out in 2003 that the principle of non-encroachment will 'probably remain a key feature of outer continental shelf cases'.[1020] He addressed the problem in the following way:

> The principle of non-encroachment concerns how close the boundary line lies to each neighboring coast, and whether in the circumstances of the case, that seems to be an equitable result. It has both a positive and a negative aspect. Each state is entitled to the projection of its coastal front, but the boundary must not 'cut off' the projection of the neighbor's coastal front. Accordingly, the principle of nonencroachment works hand in hand with special circumstances. It is really the nonencroachment perspective that comes into play in deciding that an equidistantant line will cut off the extension of the coastal front of the neighboring country. Identifying the special circumstances that causes the equidistant line to do that, and adjusting for it, leads to a satisfactory sharing of the 'cutoff' of projections of neighboring coastal fronts and thereby satisfies the principle of nonencroachment.[1021]

The problem of encroachment is of special relevance for adjacent States as the two aforementioned cases demonstrated. Legault and Hankey described this problem:

> [T]he effect on an equidistance line of a protrusion or convexity on the coast of one of the parties, or a concavity on the coast of another, is progressively magnified as the boundary extends seaward. A relatively minor feature on the coast of one of the parties, particularly when situated in the vicinity of the land boundary terminus, thus has a disproportionate effect on the delimitation. This phenomenon causes the equidistant line to swing out across the coast of one of the parties to the delimitation cutting off that state from the continental shelf lying in front of its coasts. This cut-off effect has been recognized in the jurisprudence of the ICJ and other tribunals as creative of inequity. In situations involving three or more states, the convergence of equidistant lines in front of a state abutting a concave portion of the coast between two states with convex coastlines can result in the middle state being 'shelf locked' or 'zone locked'; its maritime zone will be prevented from reaching the full extent of its seaward limit by the lateral converging equidistant boundaries of the states on either side.[1022]

If a State is prevented from reaching the full extent of its seaward limit it is likely that the inner continental shelf will not reach the 200 nm limit. If the continental shelf of a State is cut off before it reaches the 200 nm limit, it does not have any right to the continental shelf beyond 200 nm. Charney argued that decisions of international courts and tribunals have sought to 'delimit maritime boundaries so that all disputants are allotted some access to areas approaching the maximum distance

[1019] *North Sea Case* (n 26) 50, para. 91; See also *Guinea/Guinea-Bissau Case* (n 153) 295, para. 104.
[1020] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 107.
[1021] Ibid 102, fn. 62.
[1022] Leonard Legault & Blair Hankey (n 220) 216-7.

from the coast permitted for each zone'.[1023] For instance, in the *St. Pierre and Miquelon Case* the tribunal awarded France a narrow corridor which it constructed seaward from the coastline to the 200 nm limit. This is what Charney called 'the idea of maximum reach'. He noted that 'the interest to be served by the idea of maximum reach are not clear' and that 'recent cases do not even acknowledge this consideration, much less its core values'.[1024] However, if Charney is correct, his ideas can have a considerable effect on outer continental shelf boundary delimitations, especially in areas where the inner continental shelf has not already been delimited such as in the *Bay of Bengal Case*, in which ITLOS noted:

> [I]n the delimitation of the [EEZ] and the continental shelf, concavity *per se* is not necessarily a relevant circumstance. However, when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.[1025]

In this case, ITLOS found 'that the concavity of the coast of Bangladesh is a relevant circumstance in the present case, because the provisional equidistance line as drawn produces a cut-off effect on that coast requiring an adjustment of that line'.[1026] In the *Bay of Bengal Case*, ITLOS quoted the *Black Sea Case* when discussing the adjustment of an equidistance line. ITLOS noted that 'the objective is a line that allows the relevant Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually defined way'.[1027] Moreover, ITLOS decided in light of the geographic circumstances of the case – the concavity of the Bay of Bengal – that the provisional equidistance line was 'to be deflected at the point where it begins to cut off the seaward projection of the Bangladesh coast'.[1028] Consequently, the direction of the adjustment was 'to be determined in the light of those circumstances'[1029] and was found having a continuing effect beyond 200 nm.[1030]

The principle of non-encroachment and the potentially existing principle of maximum reach are of great importance for States in a disadvantaged geographical

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[1023] Charney, 'Progress in International Maritime Boundary Delimitation Law' (n 627) 247. In support of this view Charney cites the *North Sea Case* (n 26) 45, para. 81; *The Land, Island and Maritime Frontier Case (El Salvador v. Honduras)* (Judgement) [1992] ICJ Rep. 351, 606-9, paras. 415-20; *St. Pierre & Miquelon Case* (n 678) 1169-71, paras. 66-74.
[1024] Charney, 'Progress in International Maritime Boundary Delimitation Law' (n 627) 249.
[1025] *Bay of Bengal Case* (n 4) 90-1, para. 292.
[1026] Ibid 92, para. 297.
[1027] Ibid 98, para. 326 quoting *Black Sea Case* (n 56) 127, para. 201.
[1028] *Bay of Bengal Case* (n 4) 99, para. 329.
[1029] Ibid.
[1030] Ibid 133, para. 461.

position, especially those that are 'sandwiched' between adjacent States. These considerations envisage how heavily the delimitation of the continental shelf within 200 nm can influence the delimitation of the continental shelf beyond 200 nm.

5.4.1.6. The Third Step — Proportionality

As noted above, at the third stage[1031] of a delimitation a court or tribunal has to 'verify that the line … does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line'.[1032] If a court or tribunal finds that 'the proportion of the relevant water areas did not roughly coincide with the relative lengths of the coastlines, further analyses or adjustments would be considered'.[1033]

A 'difference in length is a special circumstance of some weight which ... justifies a correction of the equidistance line, or of any other line'.[1034] Proportionality 'serves to check the line of delimitation that might have been arrived at in consideration of various other factors, so as to ensure that the end result is equitable and thus in accordance with the applicable law under UNCLOS'.[1035] This final check for an equitable outcome of the delimitation 'entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths'.[1036] It is 'disproportion rather than any general principle of proportionality which is the relevant criterion or factor'.[1037] It must be noted that a minor disproportion will not have an impact on the boundary line. It has to be a situation in which 'the relationship between the length of the relevant coasts and the maritime areas generated by them by application of the equidistance method, is so disproportionate that it has been found necessary to take this circumstance into

[1031] Wolfrum is dissatisfied with the existence of this third step. He has argued that '[c]onsiderations on proportionality should cover a broader spectrum than they do now and their separation from the reasoning leading to the adjustment of the equidistance line seems to be artificial'. *Declaration of Judge Wolfrum* (n 182) 5. He is of the opinion that the second and third step should be combined.
[1032] *Black Sea Case* (n 56) 103, para. 122. It has been pointed out that '[t]he comparison of coastal lengths is ... not a comparison of total coastal lengths ... The comparison is only between the lengths of that part of each coast which has a projection or prolongation seaward overlapping with the projection of the other coast.' Bowett (n 968) 133, fn. 18.
[1033] Charney, 'Progress in International Maritime Boundary Delimitation Law' (n 627) 241.
[1034] *Gulf of Maine Case* (n 172) 322, para. 184.
[1035] *Barbados/Trinidad & Tobago Case* (n 4) 839, para. 240.
[1036] *Black Sea Case* (n 56) 103, para. 122.
[1037] *Anglo-French Case* (n 199) 58, para. 101.

account in order to ensure an equitable solution'.[1038] It must also be noted that '[t]he fact that a third party may claim the same maritime area does not prevent its inclusion in the relevant maritime area for purposes of the disproportionality test' since it 'in no way affects the rights of third parties'.[1039]

The reason why coastal lengths have a strong influence on delimitations was described by the tribunal in the *Barbados/Trinidad & Tobago Case* as the following:

> [I]t is the coast that is the basis of entitlement over maritime areas and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria. To the extent that a coast is abutting on the area of overlapping claims, it is bound to have a strong influence on the delimitation, an influence which results not only from the general direction of the coast but also from its radial projection in the area in question.[1040]

It must be emphasised that this is, however, not 'a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coast'.[1041] Worded differently: 'This is not to suggest that these respective areas should be proportionate to coastal lengths.'[1042] Nor is it a question of 'rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline'.[1043] The ICJ has 'kept well away from a purely mathematical application of the relationship between coastal lengths'.[1044] Proportionality 'has been used as a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion'.[1045]

The disproportionality test applies to the continental shelf beyond 200 nm as envisaged by ITLOS.[1046] If the foot of the slope is used as the starting point for the drawing of the provisional equidistance line, it could be argued that the ratio of the respective lengths of the foot of the slope, instead of coastal lengths, should be compared with the ratio of the relevant continental shelf of each State to find out if there is any disproportion between them. This would be in line with the

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[1038] *Jan Mayen Case* (n 871) 67, para. 65.
[1039] *Bay of Bengal Case* (n 4) 142, para. 494.
[1040] *Barbados/Trinidad & Tobago Case* (n 4) 839, para. 239.
[1041] *Jan Mayen Case* (n 871) 38, para. 68; See also *Libya/Malta Case* (n 58) 56, para. 59.
[1042] *Black Sea Case* (n 56) 103, para. 122.
[1043] *North Sea Case* (n 26) 49-50, para. 91.
[1044] *Barbados/Trinidad & Tobago Case* (n 4) 838, para. 238; *Bay of Bengal Case* (n 4) 139, para. 477.
[1045] *Barbados/Trinidad & Tobago Case* (n 4) 838, para. 238
[1046] See *Bay of Bengal Case* (n 4) 139-43, paras. 477-99.

interrelationship between entitlement and delimitation described above and would merely constitute a difference in the application of the established delimitation method.

5.4.1.7. Defining the Terminus of an Outer Continental Shelf Boundary

Defining the terminus of an outer continental shelf boundary can be problematic. This is not only because of the possible existence of an overlapping claim from a third State,[1047] but also because of the role of the CLCS in the delineation of the outer limits. The circumstances of each case are of essence. In some instances it is obvious where the terminus should end, for instance because of previously decided maritime boundaries. In other instances it is not as clear. A few possibilities have been suggested to solve this problem. The easiest solution is where the parties to a case have indicated by themselves 'the area to which the decision is to be limited by reference to third party claims or existing maritime boundary agreements'.[1048] This is, however, a rather rare situation.

Another well-established solution is based on the principle that '[t]he Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined'.[1049] Consequently, 'it is usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States'.[1050] This was for instance done in the *Libya/Malta Case*, where the interests of Italy were an issue.[1051]

In this context it must be noted that overlapping claims to a maritime area is not a bar to the jurisdiction of an international court or tribunal.[1052] In the *Anglo-French Case* the tribunal noted that its award 'will be binding only as between the

[1047] The ICJ Statute clearly provides in article 59 that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'. To prevent the potential infringement of third States' rights in bilateral cases, articles 62 and 63 of the Statute provide for the possibility for third States to intervene to protect their rights. Similar provisions are found in articles 31, 32 and 33(2) of Annex VI of UNCLOS (ITLOS Statute).

[1048] Alex Oude Elferink, 'Third States in Maritime Delimitation Cases: Too Big a Role, Too Small a Role, or Both?' in Aldo Chircop, Ted McDorman & Susan Rolston (eds.) *The Future of Ocean Regime-Building* (Martinus Nijhoff 2009) 611, 623.

[1049] See *Nicaragua/Honduras Case* (n 213) 756, para. 312.

[1050] Ibid.

[1051] *Libya/Malta Case* (n 58) 25-8, paras. 21-3; See also e.g. *Tunisia/Libya Case* (n 40) 91, para. 130; *Cameroon/Nigeria Case* (n 233) 421, para. 238.

[1052] See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (Preliminary Objections) [1998] ICJ Rep. 275, 324-5, paras. 116-7; *Qatar/Bahrain Case* (n 232) 109, para. 221; *Nicaragua/Honduras Case* (n 213) 756, para. 312.

Parties to the present arbitration and will neither be binding upon nor create any rights or obligations for any third State ... for which the Decision will be *res inter alios acta*'.[1053] The tribunal added:

> In so far as there may be a possibility that the two successive delimitations of continental shelf zones in this region, where the three States are neighbours abutting on the same continental shelf, may result in some overlapping of the zones, it is manifestly outside the competence of this Court to decide in advance and hypothetically the legal problem which may then arise. That problem would normally find its appropriate solution by negotiations directly between the three States concerned …[1054]

A different solution is 'to define the boundary as a line running in a specified direction without the indication of a final point'.[1055] The advantages of this solution are threefold. *First*, it fully addresses the request of the parties before the Court or a tribunal, at least in most instances. *Second*, it prevents the infringement of the rights of a third State since it does not define the trijunction point where the boundaries meet. It must, however, be noted that '[t]he fact that the boundary extends in a direction after a specified point implies that the same circumstances remain relevant for the determination of the boundary up to the point where it will eventually link up with other maritime boundaries in the same area'.[1056] *Third*, in the case of adjacent States that have not received recommendations from the CLCS, or which have not even made a submission to the Commission, the method prevents the terminus being defined beyond that to which they are entitled. In the Award of the arbitration between the Canadian provinces of Newfoundland and Labrador and Nova Scotia, the tribunal used this method. When arguing why the Tribunal had jurisdiction to delimit the outer continental shelf, it stated that it was only called upon to 'specify the offshore areas of the two parties *inter se* ... which it can do by providing that the line shall not extend beyond the point of intersection with the outer limit of the continental margin as determined in accordance with international law'.[1057] This was also the approach taken in the *Bay of Bengal Case*. In its judgement ITLOS decided that the boundary line within 200 nm should continue 'in the same direction beyond the 200 nm limit of Bangladesh until it reaches the area where the rights of third

[1053] *Anglo-French Case* (n 199) 27, para. 28. See also *Bay of Bengal Case* (n 4) 109, para. 367.
[1054] *Anglo-French Case* (n 199) 27, para. 28.
[1055] Oude Elferink, 'Third States in Maritime Delimitation Cases' (n 1053) 623.
[1056] Ibid 624.
[1057] *Arbitration between the Canadian provinces of Newfoundland and Labrador and Nova Scotia* (n 762) 538, para. 2.31.

States may be affected',[1058] the third state being India. This has also been done in State practice as will be discussed later in this chapter.[1059]

5.4.1.8. The 'Grey Area' Problem

In the *Bay of Bengal Case*, the delimitation of the outer continental shelf gave 'rise to an area of limited size located beyond 200 nm from the coast of Bangladesh but within 200 nm from the coast of Myanmar, yet on the Bangladesh side of the delimitation line'.[1060] What ITLOS is describing is the so called 'grey area' problem. ITLOS noted that '[s]uch an area results when a delimitation line which is not an equidistance line reaches the outer limit of one State's [EEZ] and continues beyond it in the same direction, until it reaches the outer limit of the other State's [EEZ]'.[1061] The Tribunal pointed out:

> [I]n the area beyond Bangladesh's [EEZ] that is within the limits of Myanmar's [EEZ], the maritime boundary delimits the Parties' rights with respect to the seabed and subsoil of the continental shelf but does not otherwise limit Myanmar's rights with respect to the [EEZ] …[1062]

Consequently, it seems safe to assert that there are no bases to accept the view that one State's entitlement within 200 nm trumps another State's entitlement beyond 200 nm.

ITLOS is the first Tribunal not to avoid the grey area problem when delimiting maritime boundaries. International courts and tribunals have sought at all costs to avoid that issue. States have also avoided the problem, although a few maritime boundary agreements exist that have created such zones.[1063] One reason for such avoidance is that these zones create practical inconveniences concerning enforcement and management of natural resources that need, to be resolved, for example by the creation of a specific agreement or the establishment of appropriate cooperative arrangements.[1064]

[1058] *Bay of Bengal Case* (n 4) 134, para. 462.
[1059] See chapter 5.5.3.3.
[1060] *Bay of Bengal Case* (n 4) 134, para. 463.
[1061] Ibid para. 464.
[1062] Ibid 136, para. 474.
[1063] See e.g. The 1988 Agreement between the Government of Solomon Islands and the Government of Australia Establishing Certain Sea and Sea-bed Boundaries (adopted 13 September 1988; not in force) 12 LOSB 19 (1988 Australia-Solomon Islands Agreement). The treaty is discussed in chapter 5.5.2.
[1064] See *Bay of Bengal Case* (n 4) 137, para. 476.

5.4.2. A Theory of Outer Continental Shelf Delimitation

It has been demonstrated above how the delimitation method established by international courts and tribunals for maritime areas within 200 nm applies beyond 200 nm. As discussed, the application of the three-step delimitation method could be different because of the differences of entitlement between the areas within and beyond 200 nm. To allow this to be considered as a delimitation criterion, a party will have to ask an international court or tribunal to delimit the outer continental shelf in this way. A party will probably be unlikely to try to convince a court or tribunal to do so unless it can claim a more extensive continental shelf by measuring the provisional equidistance line from the foot of the slope than with its traditional application.

As explained above, there is a link between the source for entitlement to the continental shelf and its delimitation. It can be argued that this link indicates that the process of delimitation might be different within and beyond 200 nm since entitlement to the continental shelf within the 200 nm limit is grounded on distance from the coast, whereas, arguably, entitlement to the continental shelf beyond 200 nm is rooted in the natural prolongation of a coastal State's landmass. Consequently, the application of the three-step delimitation method established by international courts and tribunals could be applied differently vis-à-vis the outer shelf as from in the inner shelf. In other words, the difference between the delimitation of the inner and outer continental shelf does not lie in the delimitation method itself, but in the different entitlement criteria.

In the inner continental shelf, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent thereto. In the outer continental shelf, the foot of the slope could be seen as the decisive factor for title to submarine areas. Arguably the foot of the slope should be seen as the starting point. Hence it could be argued that a provisional equidistance line in outer continental shelf delimitation should be conceived as departing from the foot of the slope. This could however create various technical problems and it is possible to read the decision in the *Bay of Bengal Case* as indirectly rejecting the idea.

The factors relevant enough to adjust the provisional equidistance line are likely to be geomorphological in nature, rather than geological, as the entitlement

criterion to the continental shelf is first and foremost based on geomorphology according to ITLOS. Moreover, factors based on article 76 will probably also be deemed relevant. These factors could include the different strength of title, previously decided maritime boundaries for the inner continental shelf and if the foot of the slope is used as the starting point for drawing the provisional equidistance line foot of the slope points that create inequalities could be seen as a relevant factor. Related considerations based on non-encroachment will be of importance and possibly also Charney's theory of maximum reach.

In inner continental shelf delimitations, the final check for an equitable outcome of a delimitation entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths. If the foot of the slope is used as the starting point for the drawing the provisional equidistance line, it could be argued that the ratio of the respective lengths of the foot of the slope, instead of coastal lengths, should be compared with the ratio of the relevant continental shelf of each State to find out if there is any disproportion between them.

5.5. Outer Continental Shelf Boundary Agreements

5.5.1. Introduction

As noted above, the main difference between negotiated and adjudicated maritime boundaries lies in the flexibility States enjoy in deciding how to delimit their boundaries. It will be analysed below how States have used this flexibility to negotiate boundaries involving the continental shelf beyond 200 nm. The main goal of this exercise is to find out whether there exist any trends in the practice of States. As noted in the introduction, the focus is on the delimitation method, whether States have acted on the basis that they have to delineate the limits between the outer continental shelf and the Area before they engage in a boundary delimitation with a neighbouring State and how the terminus has been defined. These boundary agreements are few, compared to the agreements that have been concluded involving maritime areas within 200 nm.

Before discussing the agreements, one issue must be addressed. Non-members to UNCLOS have engaged in outer continental shelf delimitations without any protest from other States. This may show that under customary international law such States are believed to have the right to delimit the outer continental shelf. It is

however questionable whether they can enjoy title to the outer continental shelf without being parties to UNCLOS and follow the CLCS procedure.

In this context it should be pointed out that the 1958 Continental Shelf Convention is the governing body for non-UNCLOS parties, given that they are parties to the 1958 Convention. Furthermore, the governing body with regard to oceanic interactions between an UNCLOS party and a non-UNCLOS party, which is, however, a party to the 1958 Convention, is the 1958 Convention. The reason for this lies in article 311(1) of UNCLOS which states that '[t]his Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958'. It has been pointed out that this provision 'implies that any dispute over the extent of the outer continental shelf between two states, which are both parties to the Convention on the Continental Shelf, but only one of which is a party to the LOS Convention, will be governed by the Convention on the Continental Shelf'.[1065] As explained above, that convention does not differentiate between an inner and outer continental shelf and there is no fixed limit on the maximum seaward extent of the continental shelf, as explained in chapter two.

5.5.2. State Practice

Gambia – Senegal 1975

The 1975 Agreement between The Gambia and the Republic of Senegal[1066] establishes the northern and southern maritime boundaries of the two countries. The Agreement establishes an all-purpose boundary. The northern boundary line follows a parallel of latitude, as does the southern one after a small curve.[1067] The parties decided not to use the equidistance method to avoid a cut-off effect on the Gambian maritime area[1068] with the aim of achieving an equitable delimitation.[1069] Resource

[1065] 2002 ILA Report (n 68) 750, fn. 21. It could be argued that the 1958 Continental Shelf Convention has been rendered obsolete through desuetude and is therefore no longer the governing law in this context. The VCLT Commentary notes that 'the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty'. VCLT Commentary (n 365) 237. This position is not adopted here, however, because article 311(1) cannot be seen as an abandonment of the 1958 regime with regard to interactions between State parties and non-parties to UNCLOS. It must, however, be noted that the likelihood that any State will base its claims to the outer continental shelf on exploitability is small.

[1066] Adopted 4 June 1975; entered into force 27 August 1976; Limits in the Seas No. 85 (1979) (1975 Gambia-Senegal Agreement).

[1067] Andronico Adele, 'The Gambia-Senegal' Report Number 4-2 in IMB 1 (n 22) 849, 849.

[1068] Gambia is locked into Senegal, i.e. landward it is surrounded by Senegal.

considerations seem not to have affected the choice of delimitation method.[1070] No terminus of the boundary lines is specified in the Agreement. Both parties have, however, expressed an understanding, in their preliminary submissions to the CLCS, that the boundaries extend to the continental shelf beyond 200 nm.[1071] It seems that the idea behind this arrangement is that it is for the two States to define the terminus of the boundary line after they have made a submission and received recommendations from the CLCS.[1072]

Australia – Papua New Guinea 1978

The 1978 Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters[1073] is one of the more complex maritime boundary agreements that exist. It deals with four types of maritime boundaries and addresses various related issues.[1074] It is a unique treaty in a very difficult geographical area. Most of the treaty has little relevance for the outer continental shelf. Nevertheless, '[i]n the Coral Sea, the seabed jurisdiction boundary line extends about 12 n.m. northeastward of the fisheries jurisdiction line which ends at 200 n.m. from the basepoints of the parties'.[1075] The reason for this is apparently because of the geomorphological configuration of the area.[1076] The boundary is connected with the 1988 Australia-Solomon Island boundary discussed below.

[1069] Adele, 'The Gambia-Senegal' (n 1072) 851.
[1070] Ibid 850.
[1071] Preliminary Information Indicative of the Outer Limits of the Continental Shelf and Description of the status of preparation for making a submission to the Commission on the Limits of the Continental Shelf for the Republic of Gambia (4 May 2009) 7 (Gambia Preliminary); Document d'Informations Preliminaires Indicatives sur les Limites Exterieures du Plateau Continental & Description de l'etat d'Avanacement du Dossier et Prevision de Date a Laquelle sera soumis le dossier National a la Commission des Limites du Plateau Continental des Nations Unies (12 May 2009) 9.
[1072] It must be noted that 'there may be a potential overlap between areas of the continental shelf beyond 200 nautical miles that may be claimed by the Republic of The Gambia, The Republic of Cape Verde and the Republic of Senegal'. See Gambia Preliminary (n 1076) 8.
[1073] Adopted 18 December 1978; entered into force 15 February 1985; 18 ILM 291 (1978 Australia-Papua New Guinea Agreement).
[1074] Choon-ho Park, 'Australia-Papua New Guinea' Report Number 5-3 in IMB 1 (n 22) 929, 929.
[1075] Ibid 933.
[1076] Henry Burmester, 'The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement' (1982) 76 AJIL 321, 333.

Australia – France 1982

The 1982 Agreement on Marine Delimitation between the Government of Australia and the Government of the French Republic[1077] draws two boundaries between Australian and French maritime zones in the southern Indian Ocean and the southwest Pacific Ocean. Both boundaries extend beyond 200 nm with regard to the continental shelf.

The boundary in the Indian Ocean is between the Kerguelen Islands which belong to France and the Heard and McDonald Islands which belong to Australia. The boundary is 430 nm long and defined by eight terminal and turning points which are all equidistant from the nearest points of the opposite shores. The northeastern segment of the boundary extends beyond 200 nm from the coasts of both countries, delimiting part of an outer continental shelf area known as the Kerguelen-Gaussberg Ridge.[1078] The western terminus is 200 nm from the two territories, however the eastern terminus 240 nm from the territories, i.e. it extends beyond 200 nm from the parties' coast.[1079] Prescott has noted that '[i]t seems likely that the negotiators decided to continue this boundary beyond the 200 n.m. limit in order to secure the entire available and clearly defined continental margin'.[1080] Natural resources seem not to have influenced the maritime boundary lines.[1081]

The boundary in the southwest Pacific Ocean lies in the Coral Sea between New Caledonia (France) and Australia. The boundary is 1200 nm long, with 22 terminal or turning points. Approximately half of the boundary extends beyond 200 nm. The delimitation method is a partially modified equidistant line. According to Choon-ho Park '[t]he equidistant line is supposed to have been "straightened" to improve the boundary for practical reasons, but it is not clear exactly where and to what extent such "straightening" took place'.[1082]

[1077] Adopted 4 January 1982; entered into force 9 January 1983; 1329 UNTS 107 (1982 Australia-France Agreement).

[1078] See Victor Prescott, 'Australia (Heard/McDonald Islands)-France (Kerguelen Islands)' Report Number 6-1 in IMB 2 (n 1018) 1185, 1185.

[1079] Ibid.

[1080] Ibid 1188.

[1081] Ibid 1186.

[1082] Choon-ho Park, 'Australia-France (New Caledonia)' Report Number 5-1 in IMB 1 (n 22) 905, 908. The CLCS has accepted France's submission to the area beyond 200 nm towards the agreed boundary line. Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by France in respect of French Guiana and New Caledonia Regions on 22 May 2007 (2 September 2009) 21, para. 71.

The two parties agreed that the endpoints of the two boundaries may not be the outer limit of the continental shelf, and that if a further extension of the boundaries is required, it shall be 'extended by agreement between the two Governments in accordance with international law'.[1083] According to Australia's submission to the CLCS '[t]here is a potential outstanding delimitation with France involving an extension of the Australia-France Delimitation Treaty boundary' at its western end in the Indian Ocean and the eastern end in the South Pacific Ocean.[1084]

Ireland – United Kingdom 1988

The 1988 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland Concerning the Delimitation of Areas of the Continental Shelf between the Two Countries[1085] establishes two continental shelf boundaries that extend well beyond the 200 nm limit. The first runs between the opposite coasts of England/Wales and Ireland and faces the Irish and Celtic Seas. It is 502 nm long and has 94 defined points. The second runs between the opposite coasts of Scotland and Ireland facing the northeast Atlantic into the Rockall Trough and Hatton-Rockall Plateau.[1086] It is 634 nm with 38 defined points. It is clear that economic factors influenced the boundary lines. The Preamble of the Agreement states that the two parties wish 'to open up further opportunities for their respective offshore petroleum and related industries by establishing boundaries between their respective parts of the continental shelf'.[1087] Different criteria and methods were used in different sections of the lines. According to Anderson '[t]he two sides adopted a pragmatic approach in order to achieve an equitable solution overall'.[1088] The boundary lines 'represent a negotiated solution to a dispute which had previously been destined for arbitration'.[1089] He notes that the '[m]ethods considered included equidistance, modified equidistance and

[1083] See article 3(2) of the 1982 Australia-France Agreement (n 1082).
[1084] Continental Shelf Submission of Australia; Executive Summary (15 November 2004) 17 and 35.
[1085] Adopted 7 November, 1988; entered into force 11 January 1990; 13 LOSB 48 (1988 Ireland-UK Agreement).
[1086] It must be noted that Rockall and Helen's Reef played no role in determining the course of the line. See David Anderson, 'Ireland-United Kingdom' Report Number 9-5 in IMB 2 (n 1018) 1767, 1770.
[1087] See 1988 Ireland-UK Agreement (n 1090).
[1088] Anderson, 'Ireland-United Kingdom' (n 1091) 1767.
[1089] Ibid.

bisecting coastal fronts'.[1090] The agreed lines are, however, '"stepped," in the sense that they follow parallels of latitude and meridians of longitude. The lines also take account of the two governments' compatible block systems as far as possible.'[1091] The negotiated lines present a zigzag stairlike pattern. Although not altogether an equidistance line, they do not depart far from such a line. Both boundaries stop at points that take account of UNCLOS article 76 criteria.[1092] Moreover, according to article 4 of the Agreement, nothing therein 'affects the position of either Government concerning the location of the outer edge of its continental margin'. In other words, the Parties reserve their position as to the outer edge of the continental margin.

Australia – Solomon Islands 1988

The 1988 Australia-Solomon Islands Agreement[1093] divides the 1979 Fishing Zone of Australia and the 1979 EEZ of the Solomon Islands and their continental shelf by a single (slightly modified) equidistant line drawn in the Coral Sea of the southwest Pacific Ocean. The line is approximately 150 nm long with two terminal points and one turning point in between.[1094] The boundary line is linked with two previously concluded boundaries. The east end is linked with the seabed line of the Australia-Papua New Guinea Torres Strait Agreement and the south end co-terminates with the north end of the 1982 Australia-France boundary line.[1095]

The east end of the boundary line is located beyond 200 nm from the nearest basepoints of Australia, Papua New Guinea and the Solomon Islands. The agreement created a grey area problem.[1096] Economic considerations did not seem to affect the location of the boundary line. There are no known natural resources of economic value in the area.[1097] Moreover, geological and geomorphological considerations seem not to have affected the location of the boundary line.

[1090] Ibid 1770.
[1091] Ibid.
[1092] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 95.
[1093] See (n 1068).
[1094] Choon-ho Park, 'Australia-Solomon Islands' Report Number 5-4 in IMB 1 (n 22) 977, 977.
[1095] Ibid.
[1096] See ibid 977-8.
[1097] Ibid 979.

Trinidad and Tobago – Venezuela 1990

The 1990 Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas[1098] subsumes two previously concluded maritime boundary treaties between the two States[1099] and develops the agreed boundaries further. The boundary line extends from 'the potential tri-junction with Grenada in the Caribbean, thence across the Gulf of Paria and the Columbus Channel and finally to the outer edge of the continental margin in the open Atlantic'.[1100] The boundary line is approximately 440 nm with 22 fixed points. With the 1990 agreement the line is extended by 235 nm from the previous agreements with 4 new fixed points (19-22). The final eastern segment of the extended line goes beyond the 200 nm limit and proceeds on a constant bearing to a point the parties believe to approximate the outer limits of the continental shelf.[1101]

The line broadly resembles an equidistance line. However, compared to such a line, the negotiated line favours Venezuela in its eastern portion.[1102] Hydrocarbon and mineral resources influenced the extension of the maritime boundary beyond 200 nm.[1103] Terminal point 22, which is around 6 nm beyond 200 nm was decided on the basis of geological and geomorphological data.[1104] It is clear that 'the edge of the margin was calculated on the basis of the thickness of the sedimentary rocks as equal to 1 percent of the shortest distance from the slope, and whereby the potential extension of the boundary to a point close to the 350-n.m. limit ... was virtually pre-empted by the parties'.[1105] Moreover:

> The extension of the line some 235 n.m. along a given azimuth towards a point approximately on the outer edge of the continental margin 'which delimits the national jurisdiction of the Republic of Trinidad and Tobago and of the Republic of Venezuela and the International Seabed Area ...' may be considered a pioneer attitude on this particular issue as both parties reserved the right, in case of determining that the outer edge of the continental margin is located closer to 350 n.m. from

[1098] Adopted 18 April, 1990; entered into force 23 July 1991, 1654 UNTS 300 (1990 Trinidad & Tobago-Venezuela Agreement).
[1099] The two treaties are the 1942 UK-Venezuela Treaty (n 214) and the Agreement between the Government of Trinidad and Tobago and the Government of the Republic of Venezuela on the Delimitation of Marine and Submarine Areas (First Phase) (Adopted 4 August 1989; subsumed by the entry into force of the 1990 Agreement).
[1100] Kaldone Nweihed, 'Trinidad and Tobago-Venezuela' Report Number 2-13(3) in IMB 1 (n 22) 675, 675.
[1101] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 95.
[1102] Ibid.
[1103] Nweihed, 'Trinidad and Tobago-Venezuela' (n 1105) 678.
[1104] Ibid 681.
[1105] Ibid.

> their respective baselines, and further than their current position, to establish and negotiate their respective rights up to this outer edge in accordance with international law.[1106]

However, Trinidad and Tobago's submission to the CLCS states that '[i]t is now known that the current terminus falls appreciably short of the outer limit of the continental shelf'.[1107] Consequently, 'Trinidad and Tobago … acknowledges its obligations to the Bolivarian Republic of Venezuela under the 1990 Treaty and recognizes as well that negotiation of the extension of the boundary line beyond the current terminus ... awaits action by the CLCS so that further negotiation may proceed'.[1108] It must be noted that this statement is quite interesting since the award in the *Barbados/Trinidad & Tobago Case* appears to mean that that the outer continental shelf part of the 1990 Trinidad & Tobago-Venezuela Agreement has ceased to have any practical effect because it seems that the tribunal found that Trinidad and Tobago has no continental shelf beyond 200 miles.[1109] This however did not stop Trinidad and Tobago subsequently making a submission to the CLCS in which it appears to question the tribunal's decision.[1110]

USA – USSR 1990

The 1990 Agreement between The United States of America and The Union of Soviet Socialist Republics on the Maritime Boundary[1111] created the longest maritime boundary in the world. It is approximately 1,600 nm in length between the opposite States. In general, the boundary line follows one version or another of the line under the 1867 Convention by which Russia sold Alaska to the USA.[1112] The negotiations took nine years and were highly political. Considerations of hydrocarbon resources and fisheries were prominent in the negotiations.[1113] The agreement delimits the continental shelf beyond 200 nm from the coasts of the

[1106] Ibid 677. See article 2(2) of the 1990 Trinidad & Tobago-Venezuela Agreement (n 1103).
[1107] Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea – Republic of Trinidad & Tobago; Executive Summary (12 May 2009) 13 (Trinidad & Tobago CLCS Executive Summary).
[1108] Ibid.
[1109] *Barbados/Trinidad & Tobago Case* (n 4) 856, para. 368.
[1110] See Trinidad & Tobago CLCS Executive Summary (n 1112) 14-5.
[1111] Adopted 1 June 1990; entered provisionally into force 15 June 1990; not in force; 29 ILM 941 (1990 USA-USSR Agreement).
[1112] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 96.
[1113] Elizabeth Verille, 'United States-Soviet Union' Report Number 1-6 in IMB 1 (n 22) 447, 450.

parties in the Arctic and North Pacific Oceans and Bering and Chukchi Seas.[1114] Some areas in the central Bering Sea are more than 300 nm from each coast.[1115] The boundary line 'extends from the Bering Strait north along a meridian through Chukchi Sea' far into the Arctic Ocean 'and southwestward from the Bering Strait through the Bering Sea to the 167° East meridian of longitude in the North Pacific Ocean'.[1116] Colson has noted that '[t]he Russian submission to the Commission on the Limits of the Continental Shelf sets forth the Russian view that this meridian divides outer continental shelf jurisdiction as far as the North Pole. Whether the United States agrees that the outer continental shelf extends so far is not known'.[1117] The USA, however, seems to agree on the use of the boundary line beyond 200 nm since it is 'consistent with the mutual interests of Russia and the United States in stability and expectations, and with Article 9 of Annex II' of UNCLOS.[1118]

Australia – Indonesia 1997

The 1997 Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries[1119] completes the maritime boundaries between Australia and Indonesia. Natural resources seem not to have influenced the precise location of the boundary lines.[1120] Nevertheless, resource considerations were a driving force behind the conclusion of the treaty in general.[1121] The treaty involves three boundaries: The extensions to a seabed boundary and a water column boundary in the western Timor Sea and a boundary dividing the water column and the seabed between Christmas Island and Java in the Indian Ocean.[1122] The boundary in the western Timor Sea is of importance for the discussion of maritime boundaries

[1114] Ibid 449.
[1115] Ibid 448.
[1116] Ibid 447-8.
[1117] Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 96.
[1118] US response to Russia's CLCS submission (n 396) 1.
[1119] Adopted 14 March 1997; not in force, 36 ILM 1053 (1997 Australia-Indonesia Agreement). Neither of the parties has ratified the treaty. The states have though been acting as if the 1997 treaty were in force. See Andrew Serdy, 'Is there a 400-mile rule in UNCLOS Article 76(8)?' (2008) 57 ICLQ 941, 951.
[1120] Victor Prescott, 'Australia-Indonesia' Report Number 6-2(6) in Jonathan Charney & Lewis Alexander (eds.) *International Maritime Boundaries* vol. IV (Martinus Nijhoff 2002) 2697, 2701 (hereinafter IMB 4).
[1121] Ibid.
[1122] Ibid 2698.

beyond 200 nm. This is the only maritime boundary where a maritime zone of only one party to the agreement is extended beyond 200 nm where the relevant maritime area in the negotiations is narrower than 400 nm wide.

Prescott has pointed out that '[t]he western boundary between the Points A79 and A82 seems to be unique in seabed boundary delimitation. It coincides with a line 60 n.m. seaward of the foot of the Australian continental slope and is derived from the application of Article 76(4)(a)(ii) of' UNCLOS.[1123] It is therefore obvious that geoscientific considerations have played a key role in the delimitation of this area. Prescott notes that:

> An area of 1,800 sq. n.m. in the western part of this quadrilateral area of seabed lies more than 200 n.m. from the nearest Australian territory on Scott Reef. The question therefore arises whether Australia's claim to this seabed more than 200 n.m. from its nearest baseline must be submitted to the Commission on the Limits of the Continental Shelf in accordance with Article 76(8) of the 1982 Convention on the Law of the Sea. It appears to be the Australian view that this arrangement regarding an area which lies within 200 n.m. of Indonesia's baselines does not need to be submitted to the Commission. This view is possibly based on the opinion that the chief responsibility of the Commission is to protect the deep seabed area (The Area) from being diminished by unreasonable national claims and that the area under review is not part of The Area since it lies within 200 n.m. of Indonesia's baseline.[1124]

Australia did not include this area in its submission to the CLCS which implies that Prescott could be right. Serdy has stated that 'the reaction of the Australian Minister for Resources and Energy ... suggests that the outer limits submitted by Australia were approved without significant or any alteration'.[1125]

Mexico – USA 2000

The 2000 Treaty on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles[1126] is the third maritime boundary treaty between Mexico and the USA. It is only devoted to the delimitation of the continental shelf beyond 200 nm in the so-called 'doughnut hole' area of the western Gulf of Mexico. Natural resources, especially hydrocarbons, were the driving force for concluding the treaty. It is the first maritime boundary treaty that focused only on the delimitation of the outer continental shelf. The legal status of the waters above the boundary is unaffected. The coasts of the two countries are opposite each other where the

[1123] Ibid 2708.
[1124] Ibid 2708-9.
[1125] Serdy, 'Is there a 400-mile rule in UNCLOS Article 76(8)?' (n 1124) 943 fn. 10.
[1126] 2000 USA-Mexico Agreement (n 465).

boundary was delimited. The parties viewed this treaty as the continuation of their 1978 EEZ treaty[1127] which created two gaps in the Gulf of Mexico, an eastern gap and a western gap, which are beyond 200 nm from the baselines.[1128] This treaty only addresses the western gap. It has been noted that '[i]n the early rounds of talks both sides presented evidence supporting the fact that the entire "western gap" was continental shelf under international law, specifically Article 76 of the LOS Convention'.[1129] The boundary line in this gap is a 135 nm equidistance line which takes into account all territory including islands.[1130] The same methodology as was used in the EEZ treaty is used in this treaty, i.e. the boundary is delimited based on an equidistance line measured from all points on the normal baseline, including islands.[1131] Some of the same features that were factors in the equidistance line calculation in 1978 were also used in this delimitation. Because the negotiating parties deemed that no special circumstances existed, the equidistance line was seen as an equitable outcome.[1132] It can be added that in 2007 Mexico made a submission to the CLCS regarding the same area as in the Agreement and used the negotiated boundary as its outer limit.[1133] The CLCS accepted the submission and Mexico has subsequently established its outer continental shelf on the basis of the recommendations.[1134]

Australia – New Zealand 2004

The 2004 Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries[1135] establishes two boundaries between Australia and New Zealand in the Tasman Sea. The boundary delimits overlapping EEZ generated by Norfolk Island and Three Kings Islands and by Macquarie Island and Auckland and

[1127] Treaty about Maritime Boundaries between the United States of America and the United Mexican States (adopted 4 May 1978; entered into force 13 November 1997) 17 ILM 1073.
[1128] Robert Smith, 'Mexico-United States' Report Number 1-5(2) in IMB 4 (n 1125) 2621, 2621.
[1129] Ibid 2623.
[1130] Ibid 2622.
[1131] Ibid.
[1132] Ibid 2623.
[1133] See a Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the United Mexican States pursuant to Part VI of and Annex II to the United Nations Convention on the Law of the Sea; Executive Summary (13 December 2007) 3, 4, 5, 10 & 11.
[1134] Mexico Recommendations (n 264) 9, para. 33 & 15, para. 50; See also Lathrop (n 17) 4150.
[1135] Adopted 25 July 2004; not in force; 55 LOSB 40 (2004 Australia-New Zealand Agreement).

Campbell Islands. The majority of the boundary delimits however the continental shelf in the region extending from Lord Howe Rise to Three Kings Ridge in the north and, in the south, in the region between Macquarie, Auckland and Campbell Islands.[1136] The impetus for completing the boundary line was the impending submission by the both countries to the CLCS.[1137]

The EEZ boundaries of the agreement were delimited on the basis of equidistance. Equidistance had, however, only a minor role in the delimitation of the outer continental shelf.[1138] Economic considerations did not have a determinant role in the location of the boundary line.[1139] On the other hand, geoscience played a crucial role in determining the line. In all the areas where the continental shelf beyond 200 nm was delimited 'the boundaries drawn reflect agreement between the parties as to the entitlement of each to continental shelf beyond 200 n.m. under international law'.[1140] Geomorphological factors were of high importance in deciding some portions of both boundaries. The northern line 'westwards of the physical feature of the Three Kings Ridge reflected the more pronounced natural prolongation northward from New Zealand along the Three Kings Ridge when compared with Australia's eastward natural prolongation from Norfolk Island'.[1141] The other line, 'the southern line gives precedence to prolongation from New Zealand's South Island along the Macquarie Ridge over prolongation from Macquarie Island'.[1142]

The northern and southern terminus of both boundaries 'are located at points that are either agreed by the two countries as being the outer limit of the continental shelf beyond 200 n.m. or, where there was no such agreement, at points slightly beyond the furthest possible extent of such continental shelf'.[1143] It must be noted that '[i]t is understood that the termini could be adjusted at some future point to reflect the outcomes of both countries' submissions to the' CLCS.[1144]

[1136] Nigel Fyfe & Greg French, 'Australia-New Zealand' Report Number 5-26 in IMB 5 (n 184) 3759, 3759.
[1137] Ibid 3760. The CLCS has adopted its recommendations regarding these areas. See Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Submission made by New Zealand 19 April 2006 (22 August 2008) 44, para. 148 & 54, para. 177.
[1138] Fyfe & French (n 1141) 3764.
[1139] Ibid 3761.
[1140] Ibid 3763.
[1141] Ibid 3764.
[1142] Ibid.
[1143] Ibid 3763.
[1144] Ibid.

Agreed Minutes between Denmark (Faroe Islands), Iceland and Norway 2006

An interesting approach to the delimitation of the continental shelf beyond 200 nm is found in the trilateral Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between Denmark (the Faroe Islands), Iceland and Norway (Jan Mayen and mainland Norway) in the Southern Part of the Banana Hole of the Northeast Atlantic from 20 September 2006.[1145] It has been noted that the agreement 'is an outstanding example of foresight, cooperation, and innovation both legally and technically'.[1146] Although the Agreed Minutes are not a treaty their content should not be underestimated. They seem to be of a high level of significance. One indicator of this is the fact that they were signed by the ministers of foreign affairs of the three parties. An important factor in the making of the Agreed Minutes 'was the desire to achieve a tripartitely negotiated solution of issues without giving rise to a number of complex legal issues'.[1147] Consequently, no legal reasoning was formulated to justify the provisional boundary lines.[1148] Another important factor was the previously determined maritime boundaries within 200 nm between the countries. No extensive knowledge of potential exploitable resources existed at the time of the negotiations.[1149]

The Agreed Minutes set out defined bilateral continental shelf boundaries beyond 200 nm between the opposite States and an agreed procedure for determining future delimitation lines in the southern part of the Banana Hole. The agreed boundary line has six fixed points which divide the area into three parts. Norway gets approximately half (55,528 km²) of the negotiated area and Iceland and the Faroe Islands share the other half (56,000 km²).[1150] Particular weight was not given to geological and geomorphological considerations with the exception that the parties assumed that the relevant area constituted a continuous continental shelf.[1151]

[1145] The 2006 Faroe Islands, Iceland, Norway Agreed Minutes (n 568).
[1146] David Colson, 'Introduction' in IMB 6 (n 17) xxxi, xxxii.
[1147] Rolf Fife, 'Denmark/The Faroes-Iceland-Norway' Report Number 9-26 in IMB 6 (n 17) 4532, 4544.
[1148] Ibid 4543.
[1149] Ibid 4537.
[1150] See Agreed Minutes (n 568) para. 8. Iceland gets 29.000 km² and the Faroe Islands 27.000 km².
[1151] Fife (n 1152) 4540.

An important factor in the delimitation process seems to have been the fact that Norway has a two-sided inner continental shelf/EEZ opening to the area from continental Norway and Jan Mayen. It has been pointed out that 'the resulting division of the delimitation area between the Parties played a role in the deliberations, in order to draw lines that would not lead to an inequitable result'.[1152] However, 'several of the resulting lines bear considerable resemblance to equidistance lines with adjustments, based on negotiations'.[1153] Moreover, it seems as 'previously concluded delimitation agreements for areas within 200 n.m. were not formally considered, but may nevertheless in certain cases have provided inspiration for the assessment of what could constitute an equitable solution with regard to the delimitation beyond 200 n.m.'[1154]

According to the Agreed Minutes, the three countries 'wish to effect the delimitations of the continental shelf areas beyond 200 nautical miles from the baselines between' the countries subject to the rights and obligations under UNCLOS.[1155] The Agreed Minutes provide that '[t]his will be done taking into account, inter alia, the functions of' the CLCS.[1156] Moreover, the Agreed Minutes state:

> If, after consideration of national data or other material by the Commission, it is ascertained that any part thereof belongs to 'the Area' ... the coastal State(s) concerned will establish the outer limits of the continental shelf in accordance with Article 76(8) of the Convention, without this otherwise affecting [the boundary line].[1157]

This is an important provision in case the CLCS does not accept the parties' claims to the entitlement of the continental shelf beyond 200 nm in the Banana Hole. Furthermore, the Agreed Minutes provide:

> As soon as possible, and no later than three months after the States have concluded the procedure set out in Article 76(8) of the Convention, the States will meet with a view to simultaneously concluding three parallel bilateral agreements on the final determination of the boundary lines in accordance with these *Agreed Minutes* and their appendices …[1158]

[1152] Ibid 4543.
[1153] Ibid.
[1154] Ibid.
[1155] Agreed Minutes (n 568) para. 1.
[1156] Ibid.
[1157] Ibid para. 4.
[1158] Ibid para. 9. Para. 10 states: 'The Ministers have agreed that the final delimitations will be effected by the simultaneous entry into force of the three bilateral agreements, following notification that internal requirements have been fulfilled to this end.'

The Agreed Minutes do not state whether they are based on the assumption that the CLCS must give its recommendations before the outer limits of the continental shelf is delimited between the adjacent and opposite States, or if this is a procedural method the three States agreed upon to delimit the boundary. Nonetheless, the Agreed Minutes are a good example of how States can cooperate to conclude outer continental shelf boundaries.

Kenya – Tanzania 2009

The 1976 Agreement between Kenya and the United Republic of Tanzania[1159] 'establishes a territorial sea boundary between The Pemba Island (Tanzania) and the mainland of Kenya which are opposite coasts, and then proceeds seaward to constitute an overall boundary line aimed at establishing "other areas of national jurisdiction" between the two states'.[1160] The Agreement was concluded by exchange of notes. Natural resources (except fishing by indigenous fisherman) and geological and geomorphological considerations did not influence the actual location of the boundary line.[1161]

The boundary line consists of three turning points: A, B and C. The line seaward from point C is of interest for the continental shelf beyond 200 nm. It is a 'line of latitude that neither approximates an equidistant line nor runs perpendicular to the general direction of the two nations' coasts'.[1162] According to the Agreement '[t]he eastward boundary from Point C ... shall be the latitude extending eastwards to a point where it intersects the outermost limits of territorial water boundary or areas of national jurisdiction of two States'.[1163] The 2009 Agreement between the United Republic of Tanzania and the Republic of Kenya on the Delimitation of the Maritime Boundary of the Exclusive Economic Zone and the Continental Shelf[1164] states that '[t]his Agreement shall define the maritime boundary from the limits of the Territorial Waters as defined in the 1976 Maritime Boundary Agreement starting at

[1159] Exchange of Notes between the United Republic of Tanzania and Kenya Concerning the Delimitation of the Territorial Waters Boundary between the Two States (adopted 9 July 1976; entered into force immediately upon signature) National Legislative Series, UN Doc. No. ST/LEG/SER.B/19, 406 (1976 Kenya-Tanzania Agreement).
[1160] Andronico Adele, 'Kenya-Tanzania' Report Number 4-5 in IMB 1 (n 22) 875, 876.
[1161] Ibid 877-9.
[1162] Ibid 876.
[1163] See para 2(d) of the 1976 Kenya-Tanzania Agreement (n 1164).
[1164] Adopted 23 June 2009; not in force; 70 LOSB 54 (2009 Kenya-Tanzania Agreement).

Point C'.[1165] According to article 2 of the 2009 Agreement '[t]he Parties agree that the boundary line extends eastwards to a point where it intersects the outermost limits of the continental shelf and such other outermost limits of national jurisdiction as may be determined by international law'. As with the 1975 Gambia-Senegal Agreement, it seems that the idea behind this arrangement is that it is the task of the two States to define the terminus of the boundary line after they have made their submissions to the CLCS and received the CLCS recommendations.

Barbados – France 2009

The 2009 Agreement between the Government of the French Republic and the Government of Barbados on the Delimitation of Maritime Areas between France and Barbados[1166] is a short and simple agreement. The agreement delimits the maritime area between Barbados and Guadeloupe and Martinique (France) in the Caribbean Sea. The agreement mainly concerns the delimitation of the EEZ. However, it provides that '[i]f the continental shelf of Barbados and that of France overlap beyond two hundred nautical miles' the delimitation line is extended to a certain geographic coordinate.[1167] The boundary line is an equidistance line between Martinique alone (not Guadeloupe) and Barbados.[1168] No special circumstances were deemed to exist that justified modifications to the line.[1169] No geological and geomorphological considerations influenced the outcome.[1170] The agreement makes no explicit reference to the CLCS or to article 76 of UNCLOS, although it mentions in its preamble 'the rules and principles of international law' in particular UNCLOS. Nevertheless, the CLCS will play an important role in this context since it is left to the Commission to verify whether the States are entitled to the continental shelf beyond 200 nm. Consequently, the terminus remains undefined.

[1165] Ibid article 1.2.
[1166] Adopted 15 October 2009; not in force; ORF no. 0016 20 January 2010, 1176 text no. 6 in the French Official Gazette (2009 Barbados-France Agreement).
[1167] Ibid article 3.1.
[1168] Carl Dundas, 'Barbados-France (Guadeloupe and Martinique)' Report Number 2-30 in IMB 6 (n 17) 4223, 4225.
[1169] Ibid.
[1170] Ibid.

Russia – Norway 2010

The 2010 Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean[1171] marked the end of a 40 year old maritime boundary dispute between the parties. The treaty delimits an area that can be divided into three parts. The first begins 'at the mouth of the Varangerfjord and extends to 200 nautical miles from the mainlands of Norway and Russia ... The second area is in the middle of the Barents Sea beyond 200 miles (the Barents Sea Loophole) ... The third area is in the northern Barents Sea'.[1172] It is only in the second area and in a short section of the third area that an outer continental shelf boundary between the opposite coasts of the mainland of Norway and Svalbard and of Russia (Novaya Zemlya) was required.

The eight coordinate delimitation line is a single line within 200 nm. The continental shelf boundary extends beyond that limit where the parties' shelf extends beyond 200 nm. It must be emphasised that Norway was in the unusual position that CLCS had accepted her claim to the area beyond 200 nm before the treaty was concluded[1173] and the CLCS had indicated in its recommendations to Russia that a ratified maritime boundary agreement with Norway in the Barents Sea 'would represent the outer limits of the continental shelf of the Russian Federation extending beyond 200 nautical miles in the Barents Sea'.[1174]

The treaty does not reveal much about the delimitation method except that the preamble makes reference to the provisions of UNCLOS. A joint statement made by the Russian President and the Norwegian Prime Minister a few months before the conclusion of the treaty reveals more.[1175] According to the statement, delegations from the parties recommended 'a delimitation line on the basis of international law in order to achieve an equitable solution'[1176] and that the line should divide 'the overall disputed area in two parts of approximately same size'.[1177] The only relevant factor

[1171] Adopted 15 September 2010; not in force; 50 ILM 1113.
[1172] Tore Henriksen & Geir Ulfstein, 'Maritime Delimitation in the Arctic; The Barents Sea Treaty' (2011) 42 ODIL 1, 1.
[1173] CLCS's Norway's Arctic Ocean and Barents Sea Recommendations (n 148) 15-6, para. 40 .
[1174] Oceans & LOS 2002 Report (n 398) 9, para. 39.
[1175] Joint Statement on Maritime Delimitation and Cooperation in the Barents Sea and Arctic Ocean <http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/030427_english_4.pdf> accessed 16 July 2012.
[1176] Ibid 2.
[1177] Ibid.

mentioned is 'the effect of major disparities in respective coastal lengths'.[1178] The statement does not make reference to the median line, equidistance line or a bisector line. Neither does it make reference to economic factors although they were an important underlying factor. Moreover, it is difficult to evaluate whether geographical, geological or geomorphological factors were applied.

Uruguay – Argentina 1973 – an outer continental shelf dispute

There is a disagreement as to whether the 1973 Agreement Between the Government of Argentina and the Government of Uruguay Relating to the Delimitation of the River Plate and the Maritime Boundary Between Argentina and Uruguay[1179] delimits the continental shelf beyond 200 nm. As its name indicates, the Agreement delimits the boundary between the two countries in the river Río de la Plata and establishes the maritime boundary between the parties, seaward of the closing line at the mouth of the river.[1180] Article 70 of the Agreement provides that:

> The lateral maritime boundary and the continental shelf boundary between the Oriental Republic of Uruguay and the Argentine Republic are defined by an equidistant line, determined by the adjacent coasts methods, which begins at the midpoint of the baseline consisting of an imaginary straight line that joins Punta del Este (Uruguay) and Punta Rasa del Cabo San Antonio (Argentina).

Jimenez de Aréchaga has pointed out that '[t]he outer limit of the boundary line, seaward of the closing line is not indicated. This is perhaps because the continental shelf in this area has a natural prolongation beyond 200 nautical miles ... which would eventually be subject to the rules of delimitation with the area provided' in article 76(4-6) and Annex II of UNCLOS.[1181] Uruguay's submission to the CLCS is silent on this issue. It only states that '[t]here exist, at present, no unresolved disputes over the maritime border with either of Uruguay's neighbouring countries, Argentina or Brazil'.[1182] Nevertheless, one of the points that Uruguay uses in its submission (FP 01), the southernmost point of the submission, is located 350 nm from the territorial sea baselines. According to Uruguay's submission the point 'is equidistant from

[1178] Ibid.
[1179] Adopted 19 November 1973; entered into force 12 February 1974; 13 ILM 251 (1973 Uruguay-Argentina Agreement).
[1180] Eduardo Aréchaga, 'Argentina-Uruguay' Report Number 3-2 in IMB 1 (n 22) 757, 757.
[1181] Ibid 757-8.
[1182] Submission of Republica Oriental el Uruguay to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea; Executive Summary (7 April 2009) 5 (Uruguay submission).

Punta Médenos in Argentina ... and Cabo Santa María in Uruguay ... compliant with Article 70' of the Treaty of the River Plate and its Maritime Front.[1183] Hence it appears that Uruguay is of the opinion that the agreed boundary line extends also to the outer continental shelf. Argentina however, is clearly of the opinion that there exists no maritime boundary between the States beyond 200 nm. Argentina's submission to the CLCS states:

> The boundary between the Argentine and Uruguayan continental shelves beyond the 200 nautical miles from the baselines is still to be demarcated ... The abovementioned point FP 01 of the Uruguayan submission cannot be taken as a point of the maritime lateral boundary between the two countries since such boundary has not yet been demarcated in that sector, an operation which must necessarily be bilateral.[1184]

Consequently, Argentina requested the Commission to formulate its recommendations applying para. 4(a) of Annex I of its Rules of Procedure.[1185] The submissions of the two States are currently pending before the CLCS.

The question that arises here – and which is of general importance for maritime boundary delimitations – is whether a maritime boundary which only defines a specific direction for the boundary line without indicating where the boundary terminates extends automatically beyond 200 nm, or if the parties to a boundary agreement must explicitly state that it does so. In the *Black Sea Case*, the ICJ noted that '[s]tate practice indicates that the use of a boundary agreed for the delimitation of one maritime zone to delimit another zone is effected by a new agreement'.[1186] In the view of Anderson, '[t]he Court's approach appears to mean that pre-existing boundaries only continue to serve for the purposes for which they were originally intended, and that they are not automatically transformed into boundaries serving other purposes absent the agreement of the Parties'.[1187] It could therefore be argued that in disputes such as that between Argentina and Uruguay it will be essential to show whether the boundary agreement was or was not intended to delimit the entire continental shelf. On the other hand, the dispute in the *Black Sea Case* was about the establishment of a single maritime boundary delimiting the

[1183] Ibid 11.
[1184] Outer Limit of the Continental Shelf – Argentine Submission; Executive Summary (21 April 2009) 6.
[1185] Ibid.
[1186] *Black Sea Case* (n 56) 87, para. 69.
[1187] Anderson, 'Recent Decisions of Courts and Tribunals in Maritime Boundary Cases' (n 854) 4125-6.

continental shelf and EEZ within 200 nm.[1188] The dispute between Argentina and Uruguay is different. It is only about the continental shelf. This fact creates a complexity as 'there is in law only a single "continental shelf" rather than an inner continental shelf and a separate extended or outer continental shelf'.[1189] It could therefore be argued that the dicta from the *Black Sea Case* is not applicable in disputes regarding the extent of boundary lines that only specify a direction for the continental shelf boundary without defining where it terminates. Two arguments strengthen this view in the dispute between Uruguay and Argentina. *First*, article 83(4) of UNCLOS provides: 'Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.' *Second*, at the time the 1973 Uruguay-Argentina Agreement was concluded the applicable legal regime made no distinction between broad and narrow continental shelves.[1190] Consequently, the argument can be made that the agreed boundary line between Uruguay and Argentina extends beyond 200 nm.

Brazil and Neighbouring States

In its submission to the CLCS, Brazil noted that 'it is not involved in any territorial dispute concerning maritime areas with another State'.[1191] Brazil has concluded maritime boundaries agreements with its neighbouring States, French Guiana and Uruguay. The boundary line with French Guiana, which presumably is a single line, does not have a defined terminus.[1192] The boundary with Uruguay, as agreed in the 1972 agreement, also does not have a defined terminus. It can however be assumed that it was not meant to extend beyond 200 nm since the boundary delimitation agreement between the parties stated that the boundary line extended 'to the outside

[1188] *Black Sea Case* (n 56) 70, para 17.
[1189] *Barbados/Trinidad & Tobago Case* (n 4) 835, para. 213.
[1190] See Colson, 'The Delimitation of the Outer Continental Shelf between Neighboring States' (n 842) 102.
[1191] Continental Shelf and UNCLOS Article 76 - Submission of Brazil; Executive Summary (17 May 2004) 5.
[1192] See article 1 of Maritime Delimitation Treaty between the Federative Republic of Brazil and the French Republic (French Guyana) (Adopted 30 January 1981; entered into force 19 October 1983) 25 ILM 367.

limit of the territorial sea of both countries'[1193] which according to their domestic legislation; 'at the time the agreement was signed, was 200 n.m. for both states'.[1194]. Brazil seems to assume 'that the extension of the continental shelf does not pose delimitation questions with neighbouring countries … and that it accepts that a seaward extension of the existing lateral delimitation will apply'.[1195] In the case of Uruguay, this seems to be accurate since, as mentioned above, Uruguay's submission to the CLCS states that '[t]here exist, at present, no unresolved disputes over the maritime border with either of Uruguay's neighbouring countries, Argentina or Brazil'.[1196] The situation is different in the case of French Guiana. French Guiana did not make a *note verbale* commenting on this aspect of Brazil's submission.[1197] This could be seen as a verification of Brazil's position. On the other hand it must be kept in mind that '[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed'.[1198] Consequently, without any input from French Guiana it is difficult to assume that the maritime boundary between the two adjacent States should be seen as extending beyond 200 nm.

5.5.3. Trends in State Practice

The discussion below aims to analyse whether any trends exist in negotiated outer continental shelf boundary delimitations. The discussion is divided into four parts. First, the delimitation method used in these agreements is discussed. It is then observed whether States have deemed that they must delineate the limits between the outer continental shelf and the Area before engaging in a boundary delimitation with a neighbouring State. It is then examined how the terminus has been defined. Finally, the question is asked as to whether any rule of customary international law has emerged in these regards.

[1193] Agreement between the Government of Brazil and the Government of Uruguay on the Definitive Demarcation of the Sea Outlet of the Arroyo Chui and the Lateral Maritime Border (adopted 21 July 1972; entered into force 12 June 1975) 1120 UNTS 133.
[1194] Eduardo Aréchaga, 'Brazil-Uruguay' Report Number 3-4 in IMB 1 (n 22) 785, 785.
[1195] Infante (n 265) 581.
[1196] Uruguay submission (n 1187) 5.
[1197] Neither did Uruguay.
[1198] *Nicaragua/Honduras Case* (n 213) 735, para. 253.

5.5.3.1. The Delimitation Method

Five assertions can be made about State practice regarding the method used to locate the boundary line in the outer continental shelf. *First*, States have obviously utilised the flexibility inherent in negotiations when the delimitation method used to conclude the agreements was adopted. *Second*, some of the existing boundary agreements extend previously concluded boundary lines beyond 200 nm without a change in direction (1975 Gambia-Senegal Agreement; 2000 Mexico-USA Agreement; and the 2009 Kenya-Tanzania Agreement). *Third*, a few of the agreements which delimit the inner and outer continental shelf extend the inner line without a change of direction to the outer line (1982 Australia-France Agreement; 1988 Australia-Solomon Islands Agreement; 1990 Trinidad & Tobago-Venezuela Agreement; 1990 USA-USSR Agreement; 2009 Barbados-France Agreement). *Fourth*, it appears that geoscientific factors have played a role in five agreements (1978 Australia-Papua New Guinea Agreement; 1988 Ireland-UK Agreement; the 1990 Trinidad & Tobago-Venezuela Agreement; the sui generis 1997 Australia-Indonesia Agreement; and the 2004 Australia-New Zealand Agreement). *Fifth*, no delimitation method dominates. The equidistance line or a modified equidistance line has been used in five agreements (1982 Australia-France Agreement, 1988 Australia-Solomon Islands Agreement, 1990 Trinidad & Tobago-Venezuela Agreement; 2000 Mexico-USA Agreement, 2009 Barbados-France Agreement) while some have used other methods. Some follow lines of longitude or latitude (1975 Gambia-Senegal Agreement; 1990 USA-USSR Agreement) whilst a mixture of methods or considerations are used in other agreements (1978 Australia-Papua New Guinea Agreement; 1988 Ireland-UK Agreement; 1997 Australia-Indonesia Agreement; 2004 Australia-New Zealand Agreement; 2006 Faroe Islands, Iceland, Norway Agreed Minutes; 2009 Kenya-Tanzania Agreement; 2010 Russia-Norway Agreement).

5.5.3.2. Have States waited for CLCS Recommendations?

Of the 14 concluded maritime boundary agreements in which the outer continental shelf is delimited, 12 agreements have been concluded before one or both of the parties received recommendations from the CLCS. One agreement was concluded after both parties had received recommendations (the 2010 Russia-Norway

Agreement) and one set of trilateral agreed minutes has been concluded (the 2006 Faroe Islands, Iceland, Norway Agreed Minutes) that provisionally delimits the outer continental shelf and creates a process involving submissions to the CLCS before the boundary is finally delimited. One of the agreements is rather unusual. As noted above, the 1997 Australia-Indonesia Agreement extends the continental shelf of Australia beyond 200 nm where the relevant maritime area in issue is less than 400 nm in width.

Eleven agreements that delimit the outer continental shelf, without any existing recommendations from the CLCS (or even before the CLCS was established), have been concluded after the provisions of UNCLOS on the continental shelf beyond 200 nm were finalised at the Third Law of the Sea Conference, involving 17 states, of which 15 that are parties to UNCLOS. One agreement was concluded before UNCLOS itself was concluded (the 1978 Australia-Papua New Guinea). It must be emphasised that this practice has not been protested against by any State. It can thus be argued that States have tacitly accepted that delimiting maritime boundaries by agreement and the establishment of the outer limits of the continental shelf are separate functions (although obviously interlinked). In the words of the ILC, this repeated practice by States 'constitutes objective evidence of the understanding of the parties as to the meaning of'[1199] UNCLOS on this issue and should be taken into account when interpreting the Convention.[1200]

In addition, it must be pointed out that because States have concluded agreements in which the outer continental shelf is delimited without first receiving recommendations from the CLCS, or even before making a submission to the Commission, and without any protest from third States on this issue, it would be illogical to deny States to decide by agreement to submit a delimitation dispute regarding the outer continental shelf to an international court or tribunal before they make a submission to the CLCS or before they receive recommendations from the Commission. This view is confirmed in the *Bay of Bengal Case*:

> The Tribunal observes that the exercise of its jurisdiction in the present case cannot be seen as an encroachment on the functions of the Commission, inasmuch as the settlement, through negotiations, of disputes between States regarding delimitation of the continental shelf beyond 200

[1199] VCLT Commentary (n 365) 221.
[1200] See article 31(3)(b) of the VCLT.

nm is not seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations.[1201]

5.5.3.3. Terminus

Four propositions can be made about the location of the terminus in the above agreements. *First*, three agreements leave the terminus of the boundary line undefined, i.e. they define a specific direction for the boundary line without defining where the boundary terminates. Neither the 1975 Gambia-Senegal Agreement nor the 2009 Agreement between the Governments define a terminus of the boundary line. This implies that the States plan to define the terminus after they have received recommendations from the CLCS. The 1990 USA-USSR Agreement extends the boundary line far into the Arctic along a meridian. How the two States plan to define the terminus is unclear. Difficult questions arise in this instance given that the US is not a party to UNCLOS. The 2009 Kenya-Tanzania Agreement states that the boundary line extends 'to a point where it intersects the outermost limits of the continental shelf and such other outermost limits of national jurisdiction as may be determined by international law'.[1202] This implies that the terminus will be defined after the States receive CLCS recommendations and there is a possible third party factor that needs to be addressed. A similar approach, though more cautious, is taken in the 2009 Barbados-France Agreement which states that if the continental shelf of Barbados and that of France overlap beyond 200 nm, the delimitation line is extended to a certain geographical coordinate.[1203] This implies that the boundary line will not be extended beyond 200 nm until positive CLCS recommendations have been received.

Second, four agreements – the 1982 Australia-France Agreement, the 1988 Ireland-UK Agreement, the 1990 Trinidad and Tobago-Venezuela Agreement and the 2004 Australia-New Zealand Agreement – define a terminus, but note that it can be adjusted in the future. The terminus in the 1990 Trinidad and Tobago-Venezuela Agreement needs to be relocated since it 'falls appreciably short of the outer limit of the continental shelf'.[1204]

[1201] *Bay of Bengal Case* (n 4) 115, para. 393.
[1202] 2009 Kenya-Tanzania Agreement (n 1169) article 2.
[1203] 2009 Barbados-France Agreement (n 1171) article 3.1.
[1204] Trinidad & Tobago CLCS Executive Summary (n 1112) 13.

Third, two agreements, the 2000 Mexico-USA Agreement and the 2006 Faroe Islands, Iceland, Norway Agreed Minutes fill a gap or loophole between the parties. The former agreement did so without considerations regarding the CLCS; the latter, however, introduces a certain process involving considerations regarding the CLCS.

Fourth, four agreements are not relevant in this context. The 1978 Australia-Papua New Guinea Agreement was concluded before the provisions on the outer continental shelf in UNCLOS were crystallised. The termini of the 1988 Australia-Solomon Islands Agreement is connected to other boundaries. The outer continental shelf part of two boundaries, the 2010 Russia-Norway Agreement and the 1997 Indonesia-Australia Agreement, is landward of the boundary terminus.

5.5.3.4. Customary International Law?

As is well known, 'international custom, as evidence of a general practice accepted as law' can be applied by the ICJ when deciding disputes.[1205] The relevant acts must 'amount to a settled practice' and 'be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[1206] One of the requirements in establishing State practice is to show that it has been applied constantly,[1207] extensively and in a virtually uniform manner.[1208] As discussed above, the delimitation method used in the existing outer continental shelf agreements has not been applied constantly and in a virtually uniform manner. The same can be said about the location of the terminus. Although the majority of States concluding an outer continental shelf boundary agreement have done so before making a submission to the CLCS or receiving its recommendations, some States have concluded an agreement after receiving the recommendations. This practice confirms that the delineation and delimitation procedures are separate processes, as

[1205] Article 38(1)(b) of the ICJ Statute. The ICJ for instance looked thoroughly into State practice in the *North Sea Case* (n 26) 43-7, paras. 75-85.
[1206] Ibid 44, para. 77; See also *Libya/Malta Case* (n 58) 29-30, para. 27; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 253, para. 64.
[1207] *Asylum Case (Columbia v. Peru)* (Judgement) [1950] ICJ Rep. 266, 277; See also *Case Concerning the Right of Passage over Indian Territory (Portugal v. India)* (Judgement) [1960] ICJ Rep. 6, 40.
[1208] *North Sea Case* (n 26) 43, para. 74; See also *S.S. Wimbledon (UK, France, Italy & Japan v. Poland: Germany intervening)* (Judgement) [1923] PCIJ Rep Series A No. 1, 15, 25; *Fisheries Case* (n 53) 131; *Case Concerning Rights of National of the United States of America (France v. USA)* (Judgement) [1952] ICJ Rep. 176, 200.

stated in Article 76(10) and Article 9 of Annex II to UNCLOS and by ITLOS in the *Bay of Bengal Case*.[1209] The practice is perhaps more important for the interpretation of the Convention than for the establishment of customary international law. For these reasons it seems that the general practice requirement needed to establish customary international law has not been fulfilled and consequently no special rules of customary international law have emerged that are especially applicable to outer continental shelf delimitations. Nevertheless, it is likely that the boundary agreements discussed above do not go unnoticed by state officials and will influence future maritime boundary negotiations and may provide stability, thereby contributing to the peaceful coexistence of states.

5.6. Concluding Remarks

The question was asked in the beginning of this chapter as to whether the principles of maritime boundary delimitations of the continental shelf beyond 200 nm are the same as the principles for the delimitation of the continental shelf within 200 nm. It has been pointed out that the method of delimitation is the same in inner and outer continental shelf delimitations. These arguments were confirmed in the *Bay of Bengal Case* in which ITLOS noted that the delimitation methodology is the same for the inner and outer continental shelf. This chapter has nevertheless pointed out that the method could, arguably, be applied differently in outer continental shelf delimitations. The different entitlement criteria between the areas within and beyond 200 nm are the fundamental reason for this. This difference affects outer continental shelf delimitations, since the bases for entitlement and delimitation are linked. Title to the continental shelf within 200 nm is grounded on distance from the coastal opening, whilst the title to the outer continental shelf is grounded on the natural prolongation of the land mass, as understood in light of Article 76(4). The application of this idea however creates various technical problems and it is possible to read the decision in the *Bay of Bengal Case* as indirectly rejecting it.

It is suggested that the factors that can adjust the provisional equidistance line are those based on geomorphology; rather than geology, as the entitlement criterion to the continental shelf is first and foremost based on geomorphology according to ITLOS. Factors based on article 76, such as difference in strength of title, previously

[1209] *Bay of Bengal Case* (n 4) 111, para. 376.

decided maritime boundaries for the inner continental shelf and if the foot of the slope is used as the starting point for drawing the provisional equidistance line foot of the slope points that create inequalities could be seen as a relevant factor. Finally, it is suggested that the final disproportionality check could be applied differently. It can be argued – if the foot of the slope is used as the starting point for the drawing of the provisional equidistance line – that the ratio of the respective lengths of the foot of the slope, instead of coastal lengths, should be compared with the ratio of the relevant continental shelf of each State to find out if there is any disproportion between them.

No special rule of customary international law has evolved that is solely applicable to outer continental shelf delimitations. No delimitation method has been used in a virtually uniform manner in negotiated boundary agreements involving the outer continental shelf. The same applies to the location of the terminus of the boundary line. On the other hand, the majority of States that have concluded an outer continental shelf boundary agreement have done so before making a submission to the CLCS or receiving its recommendations.

Although the method described above is arguably sound, no State has used the foot of the slope as a decisive factor in negotiated maritime boundary delimitations and no state has asked an international court or tribunal to use it in a boundary delimitation. Nonetheless, the importance of the foot of the slope should not be ruled out for outer continental shelf delimitations in future.

6. Conclusions

This thesis has addressed dispute settlement and the establishment of the outer continental shelf. It has focused on the relationship between the delineation and delimitation of the outer continental shelf, the relationship between the inner and outer continental shelf, the relationship between the CLCS and international courts and tribunals, the role of science and scientific experts in international law and who is responsible for applying and interpreting the law in an area which involves complicated scientific and technical considerations. This area of international law is vibrant and developing quickly. Although it is a narrow field of international law, all major general considerations – such as the sources of international law, the subjects of international law, the law of treaties, jurisdiction, international institutions and of course the settlement of disputes by peaceful means – have to be considered when the topic is discussed.

The modern continental shelf regime began with a unilateral declaration – the Truman declaration. Since then, customary international law, treaty law, and the judgements of international courts and tribunals have developed the concept further. It is quite symbolic that the first judgement concerning the outer continental shelf was given by ITLOS – the tribunal established by the Third Conference – namely that which created the modern treaty law on the continental shelf. Perhaps the *Bay of Bengal Case* is the spark that the Tribunal needed to become a more attractive option for States seeking to resolve their major law of the sea disputes. Another organ created by the Third Conference, the CLCS, will because of its mandate and nature, probably be the one in which most controversy will arise in the future.

This thesis makes an original contribution to knowledge in five main areas. *First*, by clarifying the difference between delineation and delimitation, substantively and procedurally, and by exploring how these actions interweave. *Second*, by clarifying the relationship between the inner and outer continental shelf. *Third*, by analysing the potential relevant circumstances in outer continental shelf delimitations. *Fourth*, by analysing the main aspects of outer continental shelf agreements. *Fifth*, by elaborating upon the foot of the slope/equidistance line delimitation method, created by Hollis Hedberg and further advanced by David Colson, to the second and third step of the maritime boundary delimitation process.

Six questions were asked at the beginning of this thesis. The *first* question asked: 'What are the similarities and differences between delineation and delimitation of the outer continental shelf?', and can be answered in the following manner. If a comparison is made between delineation and delimitation of the continental shelf beyond 200 nm at least five observations can be made. *First*, the act of delineation and delimitation consists of drawing a line that defines the jurisdiction of a coastal State. *Second*, both acts have their roots in title. *Third*, the boundary line that is established by delineation is one between a coastal State and the Area. The boundary line established by a delimitation is however between two or more coastal States. *Fourth*, if a coastal State is going to delineate the continental shelf it must make a submission to the CLCS which has to confirm the reasonableness of the submission. If a coastal State wishes to delimit the continental shelf beyond 200 nm, however, it must communicate directly with its neighbouring State(s). *Fifth*, only coastal States are competent to decide if and when they want to draw these lines.

The *second* question asked was: 'What is the role of the Commission on the Limits of the Continental Shelf in delineation and delimitation disputes?' The answer to that question lies in the different purposes of these acts. In the delineation procedure the CLCS plays the role of a scientific and technical administrative buffer zone to curtail the territorial temptation of broad margin States and to protect the Area. Another role is to assist States in the submission procedure. The Commission can be seen as an entity created in the spirit of mixed boundary commissions even if it does not share all the characteristics of such commissions. The CLCS has no formal ties with the two other bodies established by UNCLOS. It must however be noted that the activities of the bodies established by UNCLOS are supposed to be complementary. The ties between the CLCS and the Meeting of States Parties have been rather strong and the CLCS has sought the advice of the Meeting to legitimise important decisions. The Commission is comprised of individuals, not State representatives although the State that nominated the CLCS member covers his expenses. Some of the Commission's recommendations have provoked strong responses, especially regarding its interpretation of the term natural prolongation. Because ITLOS seems to have approved the Commission's interpretation in the *Bay*

of Bengal Case it is unlikely that the responses to this issue will be as strong in the future.

UNCLOS leaves no room for the CLCS when it comes to delimitation. The non-prejudice clauses of the Convention are absolutely clear on this issue. The Rules of Procedure have expanded the non-prejudice clauses to cases of unresolved land or maritime disputes, such as the dispute between Argentina and the UK concerning the Falkland Islands. This has been criticised, although this development could be seen as an amendment by agreement by the Parties in the meaning of the VCLT. Three methods (joint, separate and partial submissions) that are not described in UNCLOS have been invented to allow the Commission to carry out its delineation work without violating the non-prejudice clauses. Partial submissions are the most common submissions, comprising the majority of all submissions yet made.

The *third* question asked was the following: 'What is the role of international courts and tribunals in disputes regarding the establishment of the outer continental shelf?' The conclusion was reached that the role of international courts and tribunals in outer continental shelf delimitations is threefold; (1) to settle disputes between disputing parties regarding the delineation and delimitation of the outer continental shelf in accordance with the law; (2) to safeguard an holistic interpretation and application of international law and spare it from fragmentation; and (3) to contribute to substantive law-making. Another important task with which international courts and tribunals are faced is, in this context, the evaluation of complex scientific and technical evidence. The position taken in this thesis is that courts and tribunals are fully capable of evaluating this type of evidence by using the various available procedural methods to acquire the necessary scientific and technical expertise.

The *fourth* question asked was 'whether there are any special factors concerning the outer continental shelf that limit the jurisdiction of international courts and tribunals?' The answer to this question is that the only factor limiting the jurisdiction of international courts and tribunals in disputes regarding the outer continental shelf, any more than in different types of disputes in general, is the optional exception clause, which excludes disputes concerning maritime boundaries from the compulsory procedures entailing binding decisions. It must be strongly emphasised that the CLCS procedure does not affect the jurisdiction of a court or

tribunal in a delimitation case and there certainly does not exist an obligation for States to first determine the outer limits of their continental shelf before proceeding to a delimitation with neighbouring States. Neither does the evaluation of complex scientific and technical evidence by international courts and tribunals have any effect on their jurisdiction.

The *fifth* question asked was as follows: 'Are the principles of the delimitation of the continental shelf beyond 200 nm the same as those for within 200 nm?' When answering this question, it was maintained that the method of delimitation is the same in inner and outer continental shelf delimitations, as confirmed by ITLOS. The method could however, arguably, be applied differently in outer continental shelf delimitations. The different entitlement criteria between the areas within and beyond 200 nm are the fundamental reason for this. This difference affects outer continental shelf delimitations, since the bases for entitlement and delimitation are linked. Title to the continental shelf within 200 nm is grounded on distance from the coastal opening, whilst title to the outer continental shelf is grounded on the natural prolongation of the land mass, as understood in the light of article 76(4). The application of this idea could however create various technical problems and it is possible to read the decision in the *Bay of Bengal Case* as indirectly rejecting it.

It is suggested that the factors that can adjust the provisional equidistance line are those based on geomorphological factors; rather than geology, as the entitlement criterion to the continental shelf is first and foremost based on geomorphology according to ITLOS. Factors that may be deemed relevant enough to be able to adjust the provisional equidistance line could be based on article 76, such as difference in strength of title, previously decided maritime boundaries for the inner continental shelf and, if the foot of the slope is used as the starting point for drawing the provisional equidistance line, foot of the slope points that create inequalities. Finally, it is suggested that the final disproportionality check could be applied differently. It can be argued, if the foot of the slope is used as the starting point for the drawing of the provisional equidistance line, that the ratio of the respective lengths of the foot of the slope –instead of coastal lengths – should be compared with the ratio of the

relevant continental shelf of each State to find out if there is any disproportion between them.

The *sixth* and final question asked was whether a rule of customary international law has emerged that is especially applicable in outer continental shelf delimitations. The analysis of the concluded boundary agreements delimiting the outer continental shelf seem to confirm that no special rule of customary international law has evolved that is solely applicable to outer continental shelf delimitations. No delimitation method has been used in a consistent manner in negotiated boundary agreements involving the outer continental shelf. The same applies to the allocation of the terminus of the boundary line. Nonetheless, the majority of States that have concluded an outer continental shelf boundary agreement have done so before making a submission to the CLCS or receiving its recommendations. Inner and outer continental shelf boundary agreements are thus fairly similar. States have used the inherent flexibility of negotiations to reach a conclusion.

The main contribution of the thesis to debates regarding general international law concerns problems of coherency and fragmentation.[1210] It explains that in the first maritime boundary case before ITLOS, the Tribunal gave a coherent and consistent reading of the law on boundary delimitation, in line with the case law of ICJ and arbitral tribunals. In other words, ITLOS has done its best to ensure coherence, as has the ICJ.[1211] This fact supports Simma's statement: 'Rather than resulting in fragmentation, the emergence of more international courts, combined with an increasing willingness of states to submit their disputes to judicial settlement, has revived international legal discourse.'[1212] The thesis also explains that the ITLOS judgement does not upset the relationship between the CLCS and international courts and tribunals. Their activities are complementary to each other, as ITLOS stated. Although the CLCS has been given a functional authority to interpret and apply

[1210] See e.g. Koskenniemi (n 609) 1ff; Simma (n 609) 265ff; ILC, 'Fragmentation of International law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group on the Fragmentation of International Law, finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682.
[1211] This can for instance be seen in the *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgement) 2012 <http://www.icj-cij.org/docket/files/124/17164.pdf> accessed 4 January 2013. The case was decided after this thesis was submitted.
[1212] Simma (n 609) 279.

UNCLOS in this field of international law the importance of authoritative judicial interpretation is not less than in other fields of the law. As discussed in the thesis the decision of ITLOS developed various issues regarding the relationship between the establishment of the outer continental shelf, the dispute settlement mechanism of UNCLOS and delimitations between neighbouring states. This is a clear evidence of the law making role of the courts and tribunals under the dispute settlement mechanism of UNCLOS.

This thesis has addressed the interaction of the various mechanisms within UNCLOS concerning delineation and delimitation of the continental shelf. It has tried to fit together the various pieces of the continental shelf puzzle. The main conclusion is that despite the possibility for tension to arise the relationship between the various institutions is clear and precise and they together form a coherent system where each separate institution plays its own part in a larger process.

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In chronological order:

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